EDITOR'S NOTE

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PROCEEDINGS AND ORDERS DATE: 01279

CASE NBR 86-1-00703 CFX
SHORT TITLE Intl. Oilfield Divers, et al DOCKETED: Oct 28 1986
VERSUS Pickle, Lonnie, et al.

Date	Proceedings and Orders
Oct 28 1986	Petition for writ of certiorari filed.
Nov 24 1986	Order extending time to file response to petition until December 10, 1986.
Dec 1 1986	Brief of respondent Lonnie Pickle in opposition filed.
Dec 10 1986	DISTRIBUTED. January 9, 1987
Jan 12 1987	REDISTRIBUTED. January 16, 1987
Jan 20 1987	Petition DENIED. Dissenting opinion by Justice White with whom The Chief Justice joins. (Detached opinion.)

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NO. 86-703

In the Supreme Court of the United States

OCTOBER TERM, 1986

INTERNATIONAL OILFIELD DIVERS, INC.,
Petitioner,

and

JOHN PATRICK FISHER AND DENNIS EDWARD JENNINGS, ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON,
Petitioners,

V.

LONNIE PICKLE,
Respondent,

MARYLAND CASUALTY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Joel L. Borrello
Counsel of Record
Lynn M. Luker
Brian J. Miles
ADAMS AND REESE
4500 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-3234
Attorneys for Petitioners, International Oilfield Divers, Inc., and John Patrick Fisher and Dennis Edward Jennings, on behalf of certain underwriters at Lloyd's, London

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Fifth Circuit erred in holding that, pursuant to the Jones Act, 46 U.S.C.A. § 688, a seaman has only a slight duty to exercise reasonable care to protect himself.

2. Whether the United States Court of Appeals for the Fifth Circuit erred in holding that Respondent, Lonnie Pickle, a commercial diver, was a seaman within the meaning of the Jones Act, 46 U.S.C.A. § 688.

LIST OF INTERESTED PARTIES

1. Lonnie Pickle — Plaintiff/Respondent
2. Maryland Casualty Company — Intervenor/Respondent
3. International Oilfield Divers, Inc.[1] — Defendent/Petitioner
4. John Patrick Fisher and Dennis Edward Jennings, on behalf of certain underwriters at Lloyd's, London - Intervenors/Petitioners

[1] International Oilfield Divers, Inc. has no parent or subsidiary corporations.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

INTERNATIONAL OILFIELD DIVERS, INC.,
Petitioner,

JOHN PATRICK FISHER AND
DENNIS EDWARD JENNINGS,
ON BEHALF OF CERTAIN UNDERWRITERS
AT LLOYD'S, LONDON,
Petitioners,

versus

LONNIE PICKLE,
Respondent,

MARYLAND CASUALTY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, International Oilfield Divers, Inc. (hereinafter "IOD") and John Patrick Fisher and Dennis Edward Jennings, on behalf of certain underwriters at Lloyd's, London (hereinafter "Lloyd's"), respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered June 16, 1986, as amended, and the denial of the Petition for Panel Rehearing and/or Rehearing *En Banc* entered July 30, 1986.

OPINIONS BELOW

The Court of Appeals initially rendered its opinion on June 16, 1986 (App. at A-2, *infra*). The original opinion is unreported. On June 24, 1986, the Court of Appeals amended two pages of its opinion relating to the issue of prejudgment interest (App. at A-14, *infra*). The first amended opinion is reported in the advance sheets at 791 F.2d 1237 (1986). On July 29, 1986, one day prior to the denial of the Petition for Panel Rehearing and/or Rehearing *En Banc*, the Fifth Circuit Court of Appeals again amended its opinion, changing certain language describing the standard of care imposed on a seaman to protect himself from injury (App. at A-31, *infra*). That opinion is reported at 791 F.2d 1237 (5th Cir. 1986).

The opinions of the district court, as supplemented (App. at A-48, A-58, A-65, *infra*), have not yet been reported.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals (App. at A-2, *infra*) was entered on June 16, 1986. That opinion was amended on June 24, 1986 and July 29, 1986. (App. at A-14, A-31, *infra*). A Petition for Panel Rehearing and/or Rehearing *En Banc* was denied on July 30, 1986 (App. at A-63, *infra*). The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C.A. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 46 U.S.C.A. § 688, (Jones Act)

(a) Application of railway employee statutes; jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

* * *[2]

2. 45 U.S.C.A. § 51 (Federal Employers' Liability Act)

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the

[2]46 U.S.C.A. §688(b) is omitted since it is not at issue in this Petition.

negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE

Respondent, Lonnie Pickle (hereinafter "Pickle"), a commercial diver, filed this suit against his employer, Petitioner, IOD, under the Jones Act, 46 U.S.C.A. § 688, and the General Maritime Law, 28 U.S.C.A. § 1333, for personal injuries allegedly sustained by him on January 29, 1978.

Respondent, Maryland Casualty Company, intervened for the recovery of certain benefits paid to Pickle. Lloyd's, an excess underwriter of IOD, intervened in the appeal before the Fifth Circuit in order to protect itself against certain matters over which there was a possible conflict with its insured. Neither of these interventions involves issues pertinent to this Petition.

During his employment with IOD, Pickle worked on both vessels and platforms, depending on the job to be done. On January 9, 1978, Pickle, along with other members of his diving crew, was dispatched from the IOD

office to perform a brace setting job on a platform in the Gulf of Mexico. A barge, the ETPM 701, was utilized as a dormitory alongside the work area. Two days later, Pickle returned home for family reasons. On January 26, 1978, Pickle returned to this job, where he remained until the time of his alleged accident on January 29, 1978.

At the commencement of this job, Pickle was assigned as the lead diver of his crew by IOD. This assignment was made because Pickle was the most senior and most experienced diver employed by IOD. During the period that Pickle was temporarily ashore, his job responsibilities as lead diver were assumed by a less senior and less experienced diver, James Connell.

Pickle was never "more or less permanently" assigned to the ETPM barge 701 or to any other vessel. At the time of Pickle's accident, IOL owned no vessels. While Pickle may have dove from a vessel from time to time, he also dove from platforms, as he did on the date in question. He was dispatched to various vessels and various platforms depending upon the job. He would remain on that particular location, whether it be a platform or a vessel, only as long as the diving job would last. As soon as the diving job was completed, Pickle would go on to another location to perform a job for another customer. Depending on the job, Pickle could remain on a job for as little as an hour. On those occasions that he dove from a vessel, he had no duties aboard the vessel other than those directly related to his job as a diver.

Pickle claims that on the morning of January 29, 1978 he was injured when an underwater swell pushed him into the platform from which he was diving. Pickle was not only the most senior and the most experienced diver on the job,

he was, in fact, the most senior and the most experienced diver in the employ of IOD. He had been assigned as the lead diver of his crew for this particular job by IOD and Pickle was the ultimate person to make the choice whether, when and under what circumstances he would dive on the day of the alleged accident. He was not forced to make the dive in question, nor did he express any concern about his ability to do so. Pickle himself admitted at trial that he could have refused to dive and that if he had refused, IOD would have supported his decision.

At trial, IOD contested Pickle's status as a seaman. The trial court, sitting without a jury, found that Pickle occupied seaman status and rendered judgment in favor of Pickle and against IOD. The district court further found no contributory negligence, holding that a *seaman's duty to protect himself is slight.*

IOD appealed this judgment to the United States Court of Appeals for the Fifth Circuit and on June 16, 1986, that court, in an opinion written by Judge Politz, affirmed the judgment of the trial court. In so holding, the Fifth Circuit stated that a seaman's duty to protect himself required that he exercise *only slight, not ordinary, care.* The Fifth Circuit's opinion was amended on June 24, 1986 and July 29, 1986. The latter amendment altered the language pertaining to the standard of care for seamen, holding that a seaman has only a *slight duty to use reasonable care to protect himself.* On July 30, 1986, the day following the second amendment to the court's opinion, the Fifth Circuit denied IOD's Petition for Panel Reconsideration and/or Rehearing, *En Banc.*

ARGUMENT

I. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN HOLDING THAT A SEAMAN HAS ONLY A SLIGHT DUTY TO EXERCISE REASONABLE CARE TO PROTECT HIMSELF; A STANDARD WHICH IS IN CONFLICT WITH ALL OTHER MARITIME CIRCUITS.

In affirming this district court's holding that a seaman has only a slight duty to exercise reasonable care to protect himself, the Fifth Circuit is perpetuating an erroneous standard which is in conflict with all other maritime circuits. This issue is one which permeates, at least to some degree, virtually every Jones Act claim. For each of the past five years, there has been an average of over 6,000 marine personal injury claims pending in the United States District Courts alone. *Director of Administrative Office, United States Courts, Annual Report,* Table 30, p. 160, (1985). These figures do not take into account the vast number of marine personal injury cases pending in state courts pursuant to the Saving to Suitors Clause, U.S. Const. art. III § 2; 28 U.S.C.A. § 1333. Because of the significant number of cases affected, the confusion which presently exists in the Fifth Circuit on this issue, and the need for uniformity among the circuits, Petitioners respectfully request that this Honorable Court issue a Writ of Certiorari to review the Fifth Circuit's ruling relating to a seaman's duty to care for his own safety.

In *Ferguson v. Moore-McCormack Lines, Inc.*, 352, U.S. 521, 524, 77 S.Ct. 457, 459, 1 L.Ed. 2d 511, 515 (1957) this Court recognized that the appropriate standard of care for a Jones Act employer was that set forth in *Rogers v.*

Missouri Pacific Railroad Company, 352 U.S. 500, 524, 559, 77 S.Ct. 443, 459, 478, 1 L.Ed. 2d 493, 515, (1957), an F.E.L.A. case:

> It involves the same general concept on which is based every 'negligence case' in the state courts and in the multitudinous cases in the federal courts on diversity of citizenship in which the question is merely one of common-law negligence; that is, it is the familiar type of litigation that is part of the day-to-day business of state and federal trial judges.

Rogers v. Missouri Pacific Railroad Company, 352, U.S. at 538, 1 L.Ed. 2d at 527.

In *Page v. St. Louis Southwestern Railway Company*, 349 F.2d 820 (5th Cir. 1965) the Fifth Circuit held that the standard of negligence was the same for both employee and employer:

> As to both attack or defense, there are two common elements, (1) negligence, i.e., the standard of care, and (2) causation, i.e., the relation of the negligence to the injury. So far as negligence is concerned, that *standard is the same - ordinary prudence - for both Employee and Railroad alike.* Unless a contrary result is imperative, it is, at best, unfortunate if two standards of causation are used. We think there are several reasons why substantively there is no such imperative. (Emphasis supplied).

Id., at 823.

Consistent with the above jurisprudence, other circuits have required that a seaman exercise reasonable care for his own safety. *Akermanis v. Sea-Land Service, Inc.*, 688 F.2d 898 (2nd Cir. 1982), *cert. denied*, 464 U.S. 1039 (1984);

Tolar v. Kinsman Marine Transit Co., 618 F.2d 1193 (6th Cir. 1980); *Mroz v. Dravo Corporation*, 429 F.2d 1156 (3rd Cir. 1970); *Asaro v. Parisi*, 297 F.2d 859 (1st Cir. 1962), *cert. denied*, 370 U.S. 904 (1962); *Blevins v. United States*, 769 F.2d 175 (4th Cir. 1985). Until recently, the Fifth Circuit also adhered to the reasonable care standard for seamen. *Hussein v. Isthmian Lines, Inc.*, 405 F.2d 946 (5th Cir. 1968); *Cox v. Esso Shipping Company*, 247 F.2d 629 (5th Cir. 1957); *Superior Oil Company v. Trahan*, 322 F.2d 234 (5th Cir. 1963):

> Trahan contends that since he was using the only method available in making the transfer, he could not have been contributorily negligent. This would be the correct rule only if in so doing, he had exercised *reasonable care in the circumstances.* (Emphasis supplied).

Superior Oil Company v. Trahan, 322 F.2d at 237.

The Fifth Circuit abruptly and, it is respectfully submitted, erroneously departed from the "reasonable care" standard in *Spinks v. Chevron Oil Company*, 507 F.2d 216 (5th Cir. 1975), *clarified*, 546 F.2d 675 (5th Cir. 1977). Citing *Ferguson v. Moore-McCormack Lines, Inc., supra*, the court in *Spinks* first misapplied the term "slight" in describing the employer's standard of care:

> Under the Jones Act, even the *slightest negligence* suffices for a finding of liability. *Ferguson v. Moore-McCormack Lines, Inc.*, 1957, 352 U.S. 521, 77 S.Ct. 457, 1 L.Ed. 2d 511. (Emphasis supplied).

Spinks v. Chevron Oil Company, 507 F.2d at 223.

Compounding the error, the court in *Spinks* again misapplied the term "slight" with respect to the seaman's duty to protect himself:

> The duty owed by an employer to a seaman is so broad that it encompasses the duty to provide a safe place to work. [Citations omitted.] By comparison, *the seaman's duty to protect himself . . . is slight.* (Emphasis supplied).

Ibid.

Contrary to the above quoted standards, the use of the word "slight" originated in *Rogers, supra,* and applied only to the *causal* connection:

> Under this statute[3], the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought.

Rogers v. Missouri Pacific Railroad Company, 352 U.S. at 506, 1 L.Ed. 2d at 499.

The use of the word "slight" in *Rogers, supra,* had no connection whatsoever with the standard of conduct; it applied solely to the causal connection between substandard conduct and the injury. *Page v. St. Louis Southwestern Railway Company, supra; Alvarez v. J. Ray McDermott & Co., Inc.,* 674 F.2d 1037 (5th Cir. 1982). Through uncritical repetition, as in the *Spinks* opinion, the word "slight" erroneously became associated with the standard of conduct. Nothing, however, in the language of the Jones Act or the F.E.L.A. supports such usage; the standard of care under

[3] The court's statutory reference was to the F.E.L.A., 45 U.S.C.A. § 51, which provides for recovery where an injury results "in whole or in part" from the negligence of the employer.

the Jones Act, for both employer and seaman, remained one of reasonable care under the circumstances. *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 81 S.Ct. 6, 5 L.Ed. 2d 20 (1960); *Vickers v. Tumey*, 290 F.2d 426 (5th Cir. 1961); *Superior Oil Company v. Trahan, 322 F.2d 237.*

The only authority cited by the *Spinks* court in support of its dramatic departure from the established standard of care for seamen, was *Ballwanz v. Isthmian Lines, Inc.*, 319 F.2d 457, 462 (4th Cir. 1963), *cert. denied*, 376 U.S. 970 (1964); and *Adams v. United States*, 393 F.2d 903 (9th Cir. 1968). A review of those cases reveals no support for the proposition for which they are cited.

Ballwanz v. Isthmian Lines, Inc., supra, did not address the issue of a Jones Act seaman's duty to protect himself, rather, that case involved a longshoreman's claim based upon an alleged breach of the warranty of seaworthiness. Reversing the district court's finding of 50% contributory negligence, the Court of Appeals held that a longshoreman had no obligation to protest against the method of operation which he had been ordered to follow. The holding in *Ballwanz, supra*, in no way supports the proposition that a seaman's duty to protect himself is slight.

Similarly, in *Adams v. United States, supra*, the plaintiff, a longshoreman, brought an action for personal injuries based upon both the doctrine of unseaworthiness and general maritime law negligence. The district court found that the plaintiff was 100% responsible for his injuries since the method of unloading employed by his crew was unsafe. The Court of Appeals reversed, holding that the unsafe work method constituted an unseaworthy condition. The court further held that, since plaintiff was not a

gang boss and had no control over the work methods employed, and further, since the method of unloading was customary in the area, plaintiff was not contributorily negligent. The court's holding is in no way related to a seaman's duty to care for his own safety and does not support the proposition for which it is cited. It is apparent that the "slight duty" standard first set forth in *Spinks, supra*, and adhered to by the Fifth Circuit with minimal citation and without explanation, is without jurisprudential support.

Significantly, the *Spinks* "slight duty" standard did not resurface until five years later. *See Allen v. Seacoast Products, Inc.*, 623 F.2d 355 (5th Cir. 1980). When it did resurface, its meaning and application were anything but clear:

> In contrast to the broad duty imposed upon a vessel owner to supply a safe work place, the seaman's duty to protect himself *is slight. Bobb v. Modern Products, Inc.*, 648 F.2d 1051, 1056-57 (5th Cir. 1981). Although the seaman has a *duty to use reasonable care*, this duty is tempered by the *realities of maritime employment* 'which have been deemed . . . to place large responsibility for his safety on the owner.' *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 103, 64, S.Ct. 455, 459, 88 L.Ed. 561 (1944). (Emphasis supplied).

Ceja v. Mike Hooks, Inc., 690 F.2d 1191, 1193 (5th Cir. 1982).

Thus, at least initially, the Fifth Circuit attempted to harmonize the two standards, applying both the *Spinks* "slight duty" standard and the traditional "reasonable care" standard.

The element of "reasonableness" was further eroded, however, in *Savoie v. Otto Candies, Inc.*, 692 F.2d 363, (5th Cir. 1982), wherein the court held that:

> A seaman has *some duty* to use *reasonable care* to protect himself even though the duty is *slight*. *Bobb v. Modern Products, Inc.*, 648 F.2d 1051, 1056-57 (5th Cir. 1981). (Emphasis supplied).

Id. at 371.

Finally, in the case of *Brooks v. Great Lakes Dredge-Dock Co.*, 754 F.2d 539 (5th Cir. 1985), *initially* cited by the Fifth Circuit in support of its holding in the instant case, the *Spinks* "slight duty" standard underwent yet another metamorphosis, eliminating the element of "reasonableness" altogether:

> [T]he district court instructed the jury that contributory negligence is a failure on the part of an injured party to use *ordinary* care for his own safety under the circumstances at the time and place in question. That instruction is erroneous, however, as we have consistently held that under the Jones Act, *a seaman's duty to protect himself is not ordinary care, but slight care.* (Emphasis partially in original).
>
> *Brooks v. Great Lakes Dredge-Dock Company*, 754 F.2d at 540.

As previously noted, the Fifth Circuit in the instant case set forth *two* separate standards relating to the seaman's duty to care for his own safety. Initially, citing *Brooks v. Great Lakes Dredge-Dock Company, supra*, the court stated:

> In light of the fact that *Pickle's duty to protect himself required that he exercise only slight, not ordinary, care, Brooks v. Great Lakes Dredge-Dock Company,* 754 F.2d 539 (5th Cir. 1985), we find no error in the district court's findings and conclusions. (Emphasis partially in original).

Pickle v. International Oilfield Divers, Inc., No. 84-4368 (5th Cir. 1986) (original unpublished opinion, at p.7) (App. at , *infra*).

On July 29, 1986, one day before denying the Petition for Panel Rehearing and/or Rehearing *En Banc*, the court amended its opinion to read as follows:

> In light of the fact that *Pickle's duty to protect himself is only a slight duty to use reasonable care, Bobb v. Modern Products, Inc.*, 648 F.2d 1051 (5th Cir. 1981), we find no error in the district court's findings and conclusions. (Emphasis supplied).

Pickle v. International Oilfield Divers, Inc., 791 F.2d 1237, 1240 (5th Cir. 1986).

The foregoing history of the *Spinks* standard, and its application in the instant case, evidences the Fifth Circuit's confusion over the standard of care by which a seaman's actions should be judged. This confusion is bound to be perpetuated or, even worse, compounded, unless this Court rectifies the errant rule enunciated in this case.

In *Ceja v. Mike Hooks, Inc., supra*, the Fifth Circuit noted that the standard of "reasonable care" must be "tempered by the realities of maritime employment;" in

other words, "reasonableness" is a flexible standard which is defined by circumstances in each case. *Id.* at 1193. The standard of "reasonable care under the circumstances" is a workable rule, which permits consideration of all of those factors which may affect the standard of care or duty owed in any particular case.

In some cases, an inexperienced seaman is injured as a consequence of circumstances over which his employer has assumed complete control. Other cases involve seamen who are highly skilled tradesmen, empowered with considerable discretion as to whether, when, under what circumstances, and the manner in which their duties are undertaken. Only the standard of "reasonable care under the circumstances" has the flexibility necessary to deal effectively with individual seamen at both ends of the spectrum.

Too, the duality of standards applicable to seamen and their employers creates anomalous results which cannot be justified in law, logic, or reason. In a vast number of Jones Act cases, an employer is legally obligated to respond for the negligence of a plaintiff's co-employee. In some instances, the plaintiff and the alleged wrongdoer are workers of equal training, knowledge, or experience. Yet, under the dual standard enunciated in *Pickle*, the co-worker has a greater duty to protect the plaintiff than the plaintiff does to protect himself.

The standard or duty of care applicable to seamen's conduct requires clarification and is of sufficient importance to justify consideration by this Court. Accordingly, Petitioners request that this Honorable Court issue a Writ of Certiorari to review the Fifth Circuit's ruling on the standard of care applicable to respondent's contributory

negligence and that this Court confirm the standard of "reasonable care under the circumstances," adhered to by all other maritime circuits.

II. THE COURTS OF APPEALS ARE SHARPLY DIVIDED CONCERNING THE CRITERIA NECESSARY TO ESTABLISH SEAMAN STATUS WITHIN THE MEANING OF THE JONES ACT, 46 U.S.C.A. §688.

The district court held, and the Court of Appeals affirmed, that Pickle was a seaman within the meaning of the Jones Act. In so holding, the Fifth Circuit relied upon the status test recently set forth in its *en banc* decision in the case *Barrett v. Chevron U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986). Petitioners respectfully submit that the issue of seaman status has given rise to considerable conflict among the circuits. It is further submitted that the criteria for establishing seaman status as set forth in *Barrett v. Chevron U.S.A., Inc., supra*, are overly broad. The more appropriate standard is that adhered to by the Third and Seventh Circuits in *Griffith v. Wheeling-Pittsburgh Steel Corporation*, 521 F.2d 31 (3rd Cir. 1975), *cert. denied*, 523 U.S. 1054, (1976) and *Johnson v. John F. Beasley Construction Company*, 742 F.2d 1054 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 1180 (1985), respectively, which cases expressly incorporate the "aid to navigation" requirement as set forth by this Honorable Court in *South Chicago Coal & Dock Company v. Bassett*, 309 U.S. 251, 60 S.Ct. 544, 84 L.Ed. 732 (1940); *Norton v. Warner Company*, 321 U.S. 565, 64 S.Ct. 747, 88 L.Ed. 931 (1944); and, *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed. 2d 404 (1957).

In *Barrett v. Chevron U.S.A., Inc., supra*, the Fifth Circuit essentially reaffirmed its earlier decision in *Offshore Company v. Robison*, 266 F.2d 769 (5th Cir. 1959), wherein the two-pronged test for seaman status was set forth by Judge Wisdom:

> '[T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed *contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.*' (Emphasis Supplied).

Barrett v. Chevron U.S.A., Inc., 781 F.2d at 1072 (quoting *Offshore Company v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959)).

Expressly rejecting the "aid to navigation" requirement, the court in *Barrett* stated:

> [A]s Judge Wisdom cogently and convincingly explained in *Robison*, the later Supreme Court cases require such a broad definition of 'aid to navigation' that the test proposed by amici is entirely inconsistent with them.

Barrett v. Chevron U.S.A., Inc., 781 F.2d at 1073.

In contrast, the Seventh Circuit, in *Johnson v. John F. Beasley Construction Company, supra*, strictly construed

the "aid to navigation" requirement, expressly rejecting the liberal interpretation of seaman status set forth by the Fifth Circuit in *Offshore Company v. Robison, supra:*

> We think that the starting point provided by *Robison* is in most respects sound; however, we think that its restatement of the third prong of the traditional test (that the employee's duties must be primarily in aid of navigation), especially as *Robison's* restatement has been interpreted by courts subsequently, is too broad in that it accords insufficient weight to the relationship between the employee and the *transportation function* of the vessel. More specifically, we think the second part of the *Robison* test strays from important Jones Act principles when it speaks of the employee's duties as having to relate only to the 'function of the vessel or the accomplishment of its mission' without further qualifying 'function' and 'mission' in terms of the *transportation* function and mission of the vessel. (Emphasis in original).

Johnson v. John F. Beasley Construction Company, 742 F.2d at 1061.

In so holding, the *Johnson* court was critical of the Fifth Circuit's liberal interpretation of this Court's decisions in *Gianfala v. Texas Company,* 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 775 (1955); *Grimes v. Raymond Concrete Pile Company,* 356 U.S. 252, 78 S.Ct. 687, 2 L.Ed. 2d 737 (1958); and, *Butler v. Whiteman,* 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed. 2d 754 (1958). In support of its strict construction of the "aid to navigation" requirement, the court in *Johnson,* citing *Senko v. LaCrosse Dredging Corp., supra; South Chicago Coal & Dock Company v. Bassett, supra;* and *Norton v. Warner Company, supra,* stated:

> We think *Senko's* emphasis on 'significant navigational functions' and *Bassett* and *Norton's* emphasis on activities contributing to the operation and welfare of the vessel as a means of transport on water are *critical* to jurisdiction under the Jones Act. (Emphasis supplied).

Johnson v. John F. Beasley Construction Company, 742 F.2d at 1061.

It should be noted that the *Johnson* court's strict construction of the "aid to navigation" requirement is not without support in the Fifth Circuit. In *Barrett v. Chevron U.S.A., Inc., supra*, a plurality opinion joined by four concurring judges, the concurring opinion expressed a preference for the "aid to navigation" requirement. Noting the logic inherent in the *Johnson* court's reasoning that offshore oil field workers, i.e., those workers originally targeted by the Fifth Circuit's liberal interpretation of Jones Act status in *Offshore Company v. Robison, supra*, are now provided an adequate remedy pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C.A. § 1333(b), and the 1972 amendments to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901, *et seq.*, the concurring opinion in *Barrett* stated:

> So long as Jones Act benefits are more attractive than those of the other marine compensation schemes, astute counsel will seek to qualify their clients as 'seamen.' A bright-line rule is called for, one that nudges coverage back toward blue-water sailors for whom the Jones Act was meant. The *Johnson* test is such a rule; I would adopt it if I could. *But because it is more important to have a rule than to have the correct one, I concur.* (Emphasis supplied).

Barrett v. Chevron U.S.A., Inc., 781 F.2d at 1076.

While the need for guidance on the issue of seaman status is most cogently displayed by the conflict between the Fifth and Seventh Circuits as set forth in *Barrett, supra,* and *Johnson, supra,* it should be noted that other circuits have also developed conflicting views on the issue.

The First Circuit has adopted a liberal test for seaman status, holding that a seaman is one who does any sort of work aboard a ship in navigation. *Gahagen Const. Corporation v. Armao,* 165 F.2d 301, 305 (1st Cir. 1948), *cert. denied,* 333 U.S. 876 (1948). *See also Carumbo v. Cape Cod S.S. Company,* 123 F.2d 991 (1st Cir. 1941). Similarly, the Eighth Circuit has expressly adopted the liberal test set forth in *Offshore Company v. Robison, supra. Slatton v. Martin K. Eby Construction Company, Inc.,* 506 F.2d 505 (8th Cir. 1974).

The Second and Sixth Circuits, while formally adopting the "aid to navigation" requirement, have read "navigation" very broadly "so as to include cooks and others who contribute to the welfare of the ship, even though they do not 'reef, hand, or steer.' " *Harney v. William M. Moore Building Corporation,* 359 F.2d 649, 654 (2nd Cir. 1966). See also *Mahramas v. American Export Isbrandtsen Lines, Inc.,* 475 F.2d 165 (2nd Cir. 1973); and, *Searcy v. E.T. Slider, Inc.,* 679 F.2d 614 (6th Cir. 1982).

In contrast, the Third Circuit has, like the Seventh, narrowly construed the "aid to navigation" requirement, holding that seaman status requires that one's duties involve "significant navigational functions." *Griffith v. Wheeling-Pittsburgh Steel Corporation,* 521 F.2d at 38.

The Fourth and Ninth Circuits have rendered inconsistent opinions relating to the seaman status issue. In *Whittington v. Sewer Construction Company, Inc.*, 541 F.2d 427 (4th Cir. 1976) the court held that, in order to qualify as a Jones Act seaman, one must "serve 'naturally and primarily as an aid to navigation' in the broadest sense." *Id.* at 436. Notwithstanding the "broadest sense" language, the court held that a laborer working aboard a barge on a bridge demolition job was not a "seaman" since his duties did not aid in navigation.

Only two years earlier, the Fourth Circuit in *Lewis v. Rolland E. Trego & Sons*, 501 F.2d 372 (4th Cir. 1974) had held that one who works aboard a vessel in navigation is generally considered to be a seaman if his duties are "essential to some purpose of the vessel", even if not in actual aid of navigation. *Id.* at 374. See also *Jeffrey v. Henderson Bros.*, 193 F.2d 589 (4th Cir. 1951); and, *Lawrence v. Norfolk Dredging Company*, 319 F.2d 805 (4th Cir. 1963).

Similarly, the Ninth Circuit, while formally adopting the "aid to navigation" requirement, has liberally construed that test and has, in fact, confused it with the "function of the vessel" or "accomplishment of its mission" standard set forth in *Offshore Company v. Robison, supra. Bullis v. Twentieth Century-Fox Film Corporation*, 474 F.2d 392, 394 n. 10 (9th Cir. 1973); *Estate of Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326 (9th Cir. 1983).

It is clear that, with respect to the issue of seaman status, there is a conflict among, and sometimes within, the several maritime circuits. As noted, during each of the

past five years there has been an average of over 6,000 marine personal injury cases pending in the United States District Courts alone. *Director of Administrative Office, United States Courts, Annual Report,* Table 30, p. 160, (1985). Petitioners respectfully submit that a decision by this Honorable Court is essential to dispel the confusion, and thus reduce unnecessary litigation, concerning this issue. Petitioners further submit that the test set forth by this court in *Senko v. LaCrosse Dredging Corp., supra,* and adhered to by the Third and Seventh Circuits in *Griffith v. Wheeling-Pittsburgh Steel Corporation, supra,* and *Johnson v. John F. Beasley Construction Company, supra,* respectively, is the preferred standard.

CONCLUSION

For the above and foregoing reasons, Petitioners respectfully submit that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

Joel L. Borrello
Counsel of Record

Lynn M. Luker
Brian J. Miles
ADAMS AND REESE
4500 One Shell Square
New Orleans, Louisiana 70139
Telephone: (504) 581-3234
Attorneys for Petitioners, International Oilfield Divers, Inc., and John Patrick Fisher and Dennis Edward Jennings, on behalf of certain underwriters at Lloyd's, London

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 84-4348

LONNIE PICKLE,

Plaintiff-Appellee,

MARYLAND CASUALTY COMPANY,

Intervenor-Appellee,

versus

INTERNATIONAL OILFIELD DIVERS, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Louisiana

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(June 16, 1986)

Before GARZA, POLITZ, and HILL, Circuit Judges.
POLITZ, Circuit Judge:

This is an appeal from a Jones Act judgment after a bench trial, and involves, *inter alia*, the application of the rule recently announced in **Barrett v. Chevron, U.S.A., Inc.**, 781 F.2d 1067 (5th Cir. 1986) (en banc). Finding no merit in the challenges mounted against the district court's find-

ings on seaman status, defendant's negligence, and plaintiff's contributory negligence, we affirm on those issues. We vacate the judgment as cast, however, and remand for a reconsideration of the award of prejudgment interest and for consideration, as the court may find appropriate, of the contentions of intervenor Underwriters of Lloyd's of London (Underwriters) concerning the structuring of the mandated reimbursements to Maryland Casualty Company and International Oilfield Divers (IOD), and of the other issues discussed herein.

BACKGROUND

Lonnie Pickle, an experienced diver, was employed by IOD and was lead diver of a crew constructing an underwater brace on a fixed platform owned by ETPM-U.S.A., Inc. (ETPM) in the Gulf of Mexico off the coast of Texas. Because Pickle had to interrupt the hitch to attend a funeral, Jim Connell became lead diver for the remainder of the work assignment. The IOD crew was stationed on ETPM Barge 701 for the duration of the job.

While making his second dive on January 29, 1978, Pickle injured his back when a surge of water threw him against the jacket leg of the platform. The seas were rough, with six-to-eight foot swells, and Pickle had experienced some difficulty on his first dive that day.

Invoking the Jones Act, 46 U.S.C. § 688, and the general maritime law, Pickle sued IOD and ETPM for damages for personal injury and maintenance and cure.[1] The trial court found that Pickle was a seaman because of his assignment to ETPM Barge 701 at the time of the acci-

1. The claim against ETPM was dismissed.

dent and because 90% of his work for IOD during his three years of employment had been aboard vessels in the Gulf of Mexico. The trial court found IOD negligent because its supervisor, Connell, had failed to stop the diving during heavy seas, and it found that Pickle had not been contributorily negligent. Damages of $494,713.37 plus pre-and post-judgment interest were awarded.

In structuring the award, the court awarded Maryland Casualty, IOD's primary insurer, reimbursement totaling $29,354.19 and also allowed IOD $26,000 for sums previously paid on Pickle's behalf.[2] These sums were deducted from Pickle's award. IOD appeals.

After the appeal was noticed, Underwriters petitioned this court for leave to intervene, explaining that they provided employer's liability insurance to IOD for all sums in excess of the $25,000 primary coverage of Maryland Casualty. Because Maryland Casualty did not appeal, and recognizing the obvious vital interest of Underwriters, we granted their petition to intervene.

ANALYSIS

Seaman status.

IOD first challenges the district court's finding that Pickle was a Jones Act seaman, a finding which will not be disturbed unless it is shown to be clearly erroneous. *Yelverton v. Mobile Laboratories, Inc.*, 782 F.2d 555 (5th Cir. 1986).

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2. On appeal Maryland Casualty moved to supplement the record to show that it had actually expended $31,919.52 for Pickle. We granted the motion to supplement but deferred deciding whether the additional proof would be used in the resolution of any issue on appeal. Since we are remanding, we leave to the discretion of the district court whether the judgment should be amended, with or without the taking of further evidence, relative to this claim of Maryland Casualty, for the reasons discussed *infra*.

In *Barrett*, the *en banc* court revisited *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959), and reviewed the test for seaman status articulated there. A unanimous court reaffirmed the two-part *Robison* test which categorizes a maritime worker as a Jones Act seaman if he (1) "was assigned permanently to a vessel or performed a substantial part of his work on the vessel," and (2) "contributed to the function of the vessel or to the accomplishment of its mission." *Barrett*, 781 F.2d at 1072. Recognizing that the second prong of the test is easily determined under the Supreme Court's broad definition of "aid to navigation," *id.*, we focused primarily on refining the first prong of the *Robison* test. To this end, we directed our attention to the duration of an employee's assignment to a vessel or fleet of vessels, to the definition of a fleet, and to the question of substantial performance.

Noting that the permanent-assignment/substantial-performance test is in the disjunctive, the *Barrett* court cited *Davis v. Hill Engineering, Inc.*, 549 F.2d 314 (5th Cir. 1977), for the proposition that "a worker [may qualify as] a crew member if he does substantial work on the vessel even though his assignment to it is not 'permanent.' " 781 F.2d at 1073. Citing a number of this circuit's precedents, the en banc court continued by observing that

> in order to prove "substantial work" equivalent to permanent assignment "it must be shown that [the claimant] performed a significant part of his work aboard the vessel with at least some degree of regularity and continuity[,]" [which] "evinc[ed] a vessel relationship that is substantial in point and time and not merely spasmodic." "[This reflects] 'more than a transitory connection' with a vessel or a specific group of vessels . . . ."

> [All of which], like the status determination as a whole, is an inherently factual question . . . .

Id. at 1073-74 (citations and footnotes omitted). We completed the definitional process by stating: "By fleet we mean an indentifiable group of vessels acting together or under one control." *Id.* at 1074.

The *Barrett* court then examined the facts before it and found that during the year or so he had worked for his employer, 20-to-30% of his work was aboard vessels, although during the eight-day period immediately preceding the injury he had spent as much as 70% of his time aboard a vessel. The majority of the court took the longer view and looked to Barrett's entire period of employment in determining his status as a crew member. From that perspective, because Barrett spent 70-to-80% of his work-time aboard fixed platforms, he was not "a member of the crew of a vessel" inasmuch as "he did not perform a substantial portion of his work aboard a vessel or fleet of vessels." *Id.* at 1076.

The trial court found that Pickle spent 90% of his work-time during his employment with IOD aboard an identifiable fleet of barges. In addition, as "a commercial diver, who embodies the traditional and inevitably maritime task of navigation, [Pickle had] the legal protections of a seaman when a substantial part of his duties are performed on vessels." *Wallace v. Oceaneering Int'l.*, 727 F.2d 427, 436 (5th Cir. 1984). This is so because "[i]t is the inherently maritime nature of the tasks performed and perils faced by his profession, and not the fortuity of his tenure on the vessel from which he makes a particular dive on which he was injured, that makes Wallace a seaman." *Id.* We perceive no erroneous fact-finding and no error of

law in the trial court's determination that Pickle was a seaman.

Negligence and contributory negligence.

Without conceding but, understandably, without vigorously challenging the finding that it was negligent, IOD contends that the district court erred in finding no contributory negligence on Pickle's part. IOD argues that as an experienced diver, Pickle should have been more careful by refusing Connell's directions to dive. The court's findings on this point will not be overturned unless clearly erroneous. *Kratzer v. Capital Marine Supply, Inc.*, 645 F.2d 477 (5th Cir. 1981).

As a Jones Act employer, IOD must bear responsibility for Connell's negligence "if such negligence played any part, *even the slightest*, in producing the injury." *Theriot v. J. Ray McDermott & Co.*, 742 F.2d 877, 881 (5th Cir. 1984) (emphasis in original). In light of the fact that Pickle's duty to protect himself required that he exercise only slight, *not* ordinary, care, *Brooks v. Great Lakes Dredge-Dock Co.*, 754 F.2d 539 (5th Cir. 1985), we find no error in the district court's findings and conclusions.

Excessive award.

1. Future wages.

IOD maintains that the trial judge overestimated Pickle's lost future wages by ignoring the possibility that he might be employed at a pay scale in excess of the federal minimum wage and by failing to credit properly a medical report indicating that because of pulmonary disease not related to the accident, Pickle's future as a diver was

limited. Recognizing that an employee's work-life expectancy may be affected by evidence of his poor health, *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475 (5th Cir. 1984), the district court found that Pickle would have been employed by IOD as a diving supervisor when his diving career ended. This finding, based on testimony by IOD's president, is not clearly erroneous. It was therefore not an abuse of discretion, *see Curry v. Fluor Drilling Services*, 715 F.2d 893 (5th Cir. 1983), for the court to ignore the evidence of Pickle's pulmonary condition, which would not have affected his career as a diving supervisor. Insofar as IOD challenges the award for failure to consider employment above the minimum wage, this finding is not shown to be clearly erroneous. The evidence of such employability was random and speculative.[3]

2. Prejudgment interest

IOD next contends that the district court erred in awarding prejudgment interest without first finding that IOD was responsible for any delay. This claim is devoid of merit. An award of prejudgment interest in an admiralty case is within the district court's sound discretion, *e.g.*, *Williams v. Reading & Bates Drilling Co.*, 750 F.2d 487 (5th Cir. 1985); *Curry v. Fluor Drilling*, and does not depend on evidence of delay. "In fact, generally in maritime law, prejudgment interest should be awarded." *Curry v. Fluor Drilling*, 715 F.2d at 896 (citations omitted). *See also Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191, 1196 (5th Cir. 1982) ("As a general rule, prejudgment interest should be awarded in admiralty cases — not as a penalty, but as compensa-

[3] The testimony concerning Pickle's potential employment as a diving supervisor at a rate far in excess of the minimum wage is not relevant to this contention of IOD's, for it was conceded that due to his back injury, Pickle was ineligible for this supervisory job.

tion for the use of funds to which the claimant was rightfully entitled." (*quoting Noritake Co., v. M/V Hellenic Champion*, 627 F.2d 724, 728 (5th Cir. 1980))). The district judge found no "peculiar circumstances" that would make it inequitable to assess prejudgment interest, thereby accurately tracking the law of the circuit, *see Doucet v. Wheless Drilling, Co.*, 467 F.2d 336, 340 (5th Cir. 1972). We find no abuse of discretion in the award of prejudgment interest on damages for all losses that occurred prior to trial.

IOD further maintains that the court erred by awarding prejudgment interest on damages for loss of future income and for future pain and suffering. That challenge is meritorious. Agreeing with IOD's argument on this point, we must vacate so much of the judgment as is necessary to empower the district court on remand to reconsider the award of prejudgment interest on post-judgment losses.[4]

Claiming that this is a question of first impression, Pickle argues that the general rule prohibiting prejudgment interest on post-judgment losses should be modified in order to allow such interest where future losses have been discounted to present value. We note first that this is not a question of first impression for us. As the *Williams* court categorically declared, "Prejudgment interest . . . may not be awarded with respect to future damages." *Williams*, 750 F.2d at 491. Moreover, Pickle's argument ignores the basic rationale for denying interest on post-judgment losses: a victorious plaintiff has not suffered any delay in payment of those items, whether they have been discounted to present value or not, and hence there should

[4] Although the portion of the judgment for lost future income and benefits is clearly identifiable, remand is necessary in order to allow the district court to determine how much of the general award for pain and suffering represents a post-judgment recovery.

be no prejudgment interest allowed on them. *See generally Wyatt v. Penrod Drilling Co.*, 735 F.2d 951 (5th Cir. 1984); *Hamilton v. Canal Barge Co.*, 395 F.Supp. 978 (E.D.La. 1975) (Rubin, J.). We therefore vacate that part of the judgment and remand this question to the court *a quo* for a recalculation of prejudgment interest, excluding therefrom interest on future, unaccrued damages.

Failure to deduct social security taxes.

Finally, IOD correctly argues that the district court erred in not deducting social security taxes from its estimate of Pickle's future income. This point, however, was not made by formal objection, or by questioning during IOD's rigorous and thorough cross-examination of Pickle's expert economist, or after trial by a Fed.R.Civ.P. 59 motion, and thus has not been preserved for appeal. *See Madore v. Ingram Tank Ships, Inc.*

Structuring of judgment and reimbursements

In addressing this troublesome issue, we first note that Pickle has not filed a cross-appeal contesting the judgment's structure or the reimbursals ordered. He merely argues in his reply brief that the $26,000 reimbursement to IOD and $13,097.60 of the reimbursement to Maryland Casualty represented maintenance and should not be credited, off-set, or reimbursed. The arguments before us concerning reimbursement are those of Underwriters, the intervenors-on-appeal.

Underwriters argues that the judgment will reimburse Maryland Casualty for money it was contractually obligated to pay, thereby making Underwriters liable for a

primary amount even though it is only the excess insurer. Maryland Casualty candidly concedes that it should not have been reimbursed for amounts paid Pickle up to its policy limits of $25,000, but apparently would restrict its claim for reimbursement to the sum of $6,919.52, the amount assertedly paid in excess of those limits. Maryland Casualty's claim is based on evidence presented only to this court. We may not and do not consider it. *See Scarborough v. Dellum,* 525 F.2d 931 (5th Cir. 1976); *Smith v. United States,* 343 F.2d 539 (5th Cir.), *cert. denied,* 382 U.S. 861 (1965). Maryland Casualty may not increase the reimbursal amount *ex parte* on appeal. *See supra,* n.2. But its concession that it should not have been reimbursed for its policy limits is laudatory and appropriate, and we perceive no just reason for completely extinguishing its reimbursal award, provided the claim of Underwriters receives appropriate consideration on remand.

Underwriters' motion to intervene on appeal consists, essentially, of a claim that because of the structuring and phrasing of the reimbursal judgment, it should be considered a necessary and indispensible party under Fed.R.Civ.P. 19(a) & (b). Although the original defendants failed to present this defense to the trial court, their failure does not prevent our considering it on appeal, *United States v. Sabine Shell, Inc.,* 674 F.2d 480 (5th Cir. 1982); *McCulloch v. Glasgow,* 620 F.2d 47 (5th Cir. 1980), especially when prior to the enunciation of the judgment, Underwriters had no reason to believe that the disposition of this suit would "impair or impede" their ability to protect their interests. Fed.R.Civ.P. 19(a)(2)(i). Moreover, a Rule 19 objection can even be noticed on appeal by the reviewing court *sua sponte. Provident Trademens Bank & Trust Co. v. Patterson,* 390 U.S. 102, 19 L.Ed.2d 936 (1968); *Kimball v. Florida Bar,* 537 F.2d 1305 (5th Cir. 1976).

Although we today recognize the existence of this joinder issue, we do not find it fit for resolution at this juncture:

> We could not resolve this issue without additional briefs examining each of the factors enumerated in Rule 19, and we would have to remand in any case if we held for [intervenor] on this issue. Therefore, we think it appropriate to remand in the first instance so that . . . the district court can determine whether the [intervenor] can or should have been joined under the provisions of Rule 19.

Kimball, 537 F.2d at 1307. These same considerations mandate that we vacate that part of the judgment concerning reimbursals to Maryland Casualty and remand for a reconsideration of that issue, and for consideration of the claims of Underwriters, including the threshold question whether they should now be allowed an opportunity to present their claims.

For his part, Pickle contends that $13,097.60 of the sum paid him by Maryland Casualty represented maintenance and should not have been reimbursed. Because there has been no cross-appeal, that contention is not properly before us. We therefore do not address Pickle's argument that the $26,000 received from IOD was for maintenance and should not have been the subject of reimbursement.[5]

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[5] Implicit in the trial court's structuring of the judgment is adherence to the rule that double recovery is to be avoided. There may be some portions of the sums reimbursed to Maryland Casualty and IOD, however, which represented maintenance independent of lost past wages or other damages. Although the complaint and opinion refer to maintenance and cure, part of the award was for past fringe benefits (meals aboard ship) and part was for future fringe benefits of that kind. While payments for meals before maximum cure has been achieved can often be regarded as part of maintenance, any award for loss of future

For these reasons, we conclude that the prevailing law and the interests of justice and judicial economy require that we vacate parts of the judgment and remand this matter to the trial court for further proceedings consistent herewith.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

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fringe benefits after maximum cure has been achieved, and the duty to pay maintenance has therefore ended, can only constitute the oft-overlooked award in admiralty for "found." *See generally,* Normann, *Has Found Been Lost? An Analysis of a Seldom Utilized Concept in the Maritime Law,* 30 Loy.L.Rev. 875, 877 (1984) ("Pursuant to present case law, the plaintiff injured [while in the service of the ship] would recover maintenance through the date his physician declared his disability to be permanent, and at that point his claim for found may become viable. Hence, the prevailing view is that he may not recover maintenance and found for the same period, but once maintenance terminates he may be entitled to found. In this sense, the recoveries are mutually exclusive, but only within the same time frame."). (Footnote Continued.)

June 24, 1986

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

No. 84-4348 - Pickle vs. International Oilfield

Dear Counsel:

At the Court's direction enclosed are two pages with additions, which are highlighted, to the opinion issued in manuscript in the referenced appeal on June 16, 1986. The slip opinion in this cause will issue on June 27, 1986, and these additions will be in the opinion.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By S/S Betty G. Martinez
Deputy Clerk

cc and enclosure to:

Messrs. Joel L. Borrello
Lynn M. Luker
Messrs. Owen M. Goudelocke
John A. Jeansonne, Jr.
Craig W. Marks
Mr. Charles Carmelo Culotta, Jr.
Mr. Lawrence K. Burleigh
Messrs. Edward J. Marquet
John K. Hill, Jr.

IOD furthur (sic) maintains that the court erred by awarding prejudgment interest on damages for loss of future income and for future pain and suffering. That challenge is meritorious as it relates to the interest on damages for future pain and suffering. Agreeing with IOD's argument on this point, we must vacate so much of the judgment as is necessary to empower the district court on remand to reconsider the award of prejudgment interest on post-judgment losses.[4]

Claiming that this is a question of first impression, Pickle argues that the general rule prohibiting prejudgment interest on post-judgment losses should be modified in order to allow such interest where future losses have been discounted to present value. We note first that this is not a question of first impression for us. As the *Williams* court categorically declared, "Prejudgment interest . . . may not be awarded with respect to future damages." *Williams*, 750 F.2d at 491. Moreover, Pickle's argument ignores the basic rationale for denying interest on post-judgment losses: a victorious plaintiff has not suffered any delay in payment of those items, whether they have been discounted to present value or not, and hence there should be no prejudgment interest allowed on them. *See generally Wyatt v. Penrod Drilling Co.*, 735 F.2d 951 (5th Cir. 1984); *Hamilton v. Canal Barge Co.*, 395 F.Supp 978 (E.D.La. 1975) (Rubin, J.).[5] We therefore vacate that part of the judgment and remand this question to the court *a quo* for a recalculation of prejudgment interest, excluding therefrom interest on future, unaccrued, non-economic damages.

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[4] Although the portion of the judgment for lost future income and benefits is clearly identifiable, remand is necessary in order to allow the district court to determine how much of the general award for pain and suffering represents a post-judgment recovery.

[5] In so stating we underscore, however, that as to economic losses this dispute is to be resolved pursuant to the rule of *Culver I*, 688 F.2d 280 (5th Cir. 1982) (*en banc*). *Culver II*, 722 F.2d 114 (5th Cir. 1983) (*en banc*), applies only to cases decided thereafter.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LONNIE PICKLE,

Plaintiff-Appellee,

MARYLAND CASUALTY COMPANY,

Intervenor-Appellee,

v.

INTERNATIONAL OILFIELD DIVERS, INC.

Defendant-Appellant.

No. 84-4348

OPINION

Filed June 16, 1986

Before: Reynaldo G. Garza, Henry A. Politz, and Robert M. Hill, Circuit Judges.

Opinion by Judge Henry A. Politz

Appeal from the United States District Court for the Western District of Louisiana
John M. Shaw, District Judge, Presiding

SUMMARY

Admiralty

Appeal from judgment in favor of an injured worker after finding that he was a Jones Act seaman, that employer was negligent, and that he was not contributorily negligent. Affirmed in part, vacated in part and remanded.

Appellee Pickle was employed by International Oilfield Divers (IOD) and was a diver on a crew constructing an underwater brace on a fixed platform in the Gulf of Mexico. On a day when the seas were rough, Pickle was injured when a surge of water threw him against the platform. Invoking the Jones Act, 46 U.S.C.§688, and general maritime law, Pickle sued IOD for damages. The district court found that Pickle was a seaman, that IOD was negligent because its supervisor had not stopped the diving during heavy seas, and that Pickle had not been contributorily negligent. Damages plus pre- and post-judgment interest were awarded. In structuring the award, the court deducted sums previously paid on Pickle's behalf by IOD and Maryland Casualty Company, IOD's primary insurer. After appeal, IOD's excess insurance carrier, Underwriters of Lloyd's of London (Underwriters), moved to intervene.

[1] A maritime worker is a Jones Act seaman if he (1) was assigned permanently to a vessel or performed a substantial part of his work on the vessel, and (2) contributed to the function of the vessel or to the accomplishment of its mission. [2] Here, the trial court found that Pickle spent 90% of his work-time aboard an indentifiable fleet of barges. In addition, as a commercial diver, he had the legal protections of a seaman when a substantial part of his duties are performed on vessels. There is no error in the determination that Pickle was a seaman. [3] Although IOD argues that as an experienced diver, Pickle should have been more careful by refusing the supervisor's direc-

tions to dive, [4] as a Jones Act employer, IOD must bear the responsibility for the supervisor's negligence if it played any part, even the slightest, in producing the injury. Because Pickle's duty to protect himself required that he exercise only slight, not ordinary care, there is no error in the finding that Pickle was not contributorily negligent. [5] IOD maintains that the trial judge overestimated Pickle's lost future wages by ignoring the possibility that he might be employed at a pay scale in excess of the federal minimum wage and by failing to credit properly a medical report indicating that because of pulmonary disease not related to the injury, Pickle's future as a diver was limited. However, the court found that Pickle would have been employed as a diving supervisor when his diving career ended, and so the court could ignore the pulmonary condition, which would not have affected his career as a diving supervisor. As to the failure to consider employment above minimum wage, the evidence of such employability was random and speculative.

[6] IOD's contention that the district court erred in awarding prejudgment interest without first finding that IOD was responsible for any delay is without merit. An award of prejudgment interest in an admiralty case does not depend on evidence of delay. [7] IOD's challenge to the award of prejudgment interest on damages for future pain and suffering is meritorious. [8] Prejudgment interest may not be awarded with respect to future damages, and that part of the judgment is vacated and remanded. [9] Underwriters claims that because of the structuring of the reimbursal judgment, it should be considered a necessary and indispensable party. [10] Because it is appropriate for the district court to determine whether Underwriters can be joined, that part of the judgment concerning reimbursals to Maryland Casualty is vacated and the matter remanded.

OPINION

HENRY A. POLITZ, Circuit Judge:

This is an appeal from a Jones Act judgment after a bench trial, and involves, *inter alia*, the application of the rule recently announced in *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986) (en banc). Finding no merit in the challenges mounted against the district court's findings on seaman status, defendant's negligence, and plaintiff's contributory negligence, we affirm on those issues. We vacate the judgment as cast, however, and remand for a reconsideration of the award of prejudgment interest and for consideration, as the court may find appropriate, of the contentions of intervenor Underwriters of Lloyd's of London (Underwriters) concerning the structuring of the mandated reimbursements to Maryland Casualty Company and International Oilfield Divers (IOD), and of the other issues discussed herein.

BACKGROUND

Lonnie Pickle, an experienced diver, was employed by IOD and was lead diver of a crew constructing an underwater brace on a fixed platform owned by ETPM-U.S.A., Inc. (ETPM) in the Gulf of Mexico off the coast of Texas. Because Pickle had to interrupt the hitch to attend a funeral, Jim Connell became lead diver for the remainder of the work assignment. The IOD crew was stationed on ETPM Barge 701 for the duration of the job.

While making his second dive on January 29, 1978, Pickle injured his back when a surge of water threw him against the jacket leg of the platform. The seas were rough, with six-to-eight foot swells, and Pickle has (sic) experienced some difficulty on his first dive that day.

Invoking the Jones Act, 46 U.S.C.§688, and the general maritime law, Pickle sued IOD and ETPM for damages for personal injury and maintenance and cure.[1] The trial court found that Pickle was a seaman because of his assignment to ETPM Barge 701 at the time of the accident and because 90% of his work for IOD during his three years of employment has been aboard vessels in the Gulf of Mexico. The trial court found IOD negligent because its supervisor, Connell, had failed to stop the diving during heavy seas, and it found that Pickle had not been contributorily negligent. Damages of $494,713.37 plus pre-and post-judgment interest were awarded.

In structuring the award, the court awarded Maryland Casualty, IOD'S (sic) primary insurer, reimbursement totaling $29,354.19 and also allowed IOD $26,000 for sums

[1] The claim against ETPM was dismissed.

previously paid on Pickle's behalf.[2] These sums were deducted from Pickle's award. IOD appeals.

After the appeal was noticed, Underwriters petitioned this court for leave to intervene, explaining that they provided employer's liability insurance to IOD for all sums in excess of the $25,000 primary coverage of Maryland Casualty. Because Maryland Casualty did not appeal, and recognizing the obvious vital interest of Underwriters, we granted their petition to intervene.

ANALYSIS

Seaman Status.

IOD first challenges the district court's findings that Pickle was a Jones Act seaman, a finding which will not be disturbed unless it is shown to be clearly erroneous. *Yelverton v. Mobile Laboratories, Inc.*, 782 F.2d 555 (5th Cir. 1986).

[1] In *Barrett*, the *en banc* court revisited *Offshore Co., v. Robison*, 266 F.2d 769 (5th Cir. 1959), and reviewed the test for seaman status articulated there. A unanimous court reaffirmed the two-part *Robison* test which categorizes a maritime worker as a Jones Act seaman if he (1) "was assigned permanently to a vessel or performed a substantial part of his work on the vessel," and (2) "contributed to the function of the vessel or to the accomplish-

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[2] On appeal Maryland Casualty moved to supplement the record to show that it had actually expended $31,919.52 for Pickle. We granted the motion to supplement but deferred deciding whether the additional proof would be used in the resolution of any issue on appeal. Since we are remanding, we leave to the discretion of the district court whether the judgment should be amended with or without the taking of further evidence, relative to this claim of Maryland Casualty, for the reasons discussed *infra*.

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Noting that the permanent-assignment/substantial-performance test is in the disjunctive, the *Barrett* court cited *David v. Hill Engineering, Inc.*, 549 F.2d 314 (5th Cir. 1977), for the proposition that "a worker [may qualify as] a crew member if he does substantial work on the vessel even though his assignment to it is not 'permanent.' " 781 F.2d at 1073. Citing a number of this circuit's precedents, the en banc court continued by observing that

> in order to prove "substantial work" equivalent to permanent assignment "it must be shown that [the claimant] performed a significant part of his work aboard the vessel with at least some degree of regularity and continuity[,]" [which] "evinc[ed] a vessel relationship that is substantial in point and time and not merely spasmodic." "[This reflects] 'more than a transitory connection' with a vessel or a specific group of vessels . . . ."
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> [All of which], like the status determination as a whole, is an inherently factual question . . . .

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The *Barrett* court then examined the facts before it and found that during the year or so he had worked for his employer, 20-to-30% of his work was aboard vessels, although during the eight-day period immediately preceding the injury he had spent as much as 70% of his time aboard a vessel. The majority of the court took the longer view and looked to Barrett's entire period of employment in determining his status as a crew member. From that perspective, because Barrett spent 70-to-80% of his work-time aboard fixed platforms, he was not "a member of the crew of a vessel" inasmuch as "he did not perform a substantial portion of his work aboard a vessel or fleet of vessels." *Id.* at 1076.

[2] The trial court found that Pickle spent 90% of his work-time during his employment with IOD aboard an identifiable fleet of barges. In addition, as "a commercial diver, who embodies the traditional and inevitably maritime task of navigation, [Pickle had] the legal protections of a seaman when a substantial part of his duties are performed on vessels." *Wallace v. Oceaneering Int'l.*, 727 F.2d 427 436 (sic) (5th Cir. 1984). This is so because "[i]t is the inherently maritime nature of the tasks performed and perils faced by his profession, and not the fortuity of his tenure on the vessel from which he makes a particular dive on which he was injured, that makes Wallace a seaman." *Id.* We perceive no erroneous fact-finding and no error of law in the trial court's determination that Pickle was a seaman.

Negligence and Contributory Negligence

[3] Without conceding but, understandably, without vigorously challenging the finding that it was negligent, IOD contends that the district court erred in finding no

contributory negligence on Pickle's part. IOD argues that as an experienced diver, Pickle should have been more careful by refusing Connell's directions to dive. The court's findings on this point will not be overturned unless clearly erroneous. *Kratzer v. Capital Marine Supply, Inc.*, 645 F.2d 477 (5th Cir. 1981).

[4] As a Jones Act employer, IOD must bear responsibility for Connell's negligence "if such negligence played any part, *even the slightest*, in producing the injury." *Theriot v. J. Ray McDermott & Co.*, 742 F.2d 877, 881 (5th Cir. 1984) (emphasis in original). In light of the fact that Pickle's duty to protect himself required that he exercise only slight, *not* ordinary, care, *Brooks v. Great Lakes Dredge-Dock Co.*, 754 F.2d 539 (5th Cir. 1985), we find no error in the district court's findings and conclusions.

Excessive Award.

1. *Future Wages*

[5] IOD maintains that the trial judge overestimated Pickle's lost future wages by ignoring the possibility that he might be employed at a pay scale in excess of the federal minimum wage and by failing to credit properly a medical report indicating that because of pulmonary disease not related to the accident, Pickle's future as a diver was limited. Recognizing that an employee's work-life expectancy may be affected by evidence of his poor health, *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475 (5th Cir. 1984), the district court found that Pickle would have been employed by IOD as a diving supervisor when his diving career ended. This finding, based on testimony by IOD's president, is not clearly erroneous. It was therefore not an abuse of discretion, *see Curry v. Fluor Drilling Services,*

751 F.2d 893 (5th Cir. 1983), for the court to ignore the evidence of Pickle's pulmonary condition, which would not have affected his career as a diving supervisor. Insofar as IOD challenges the award for failure to consider employment above the minimum wage, this finding is not shown to be clearly erroneous. The evidence of such employability was random and speculative.[3]

2. *Prejudgment Interest*

[6] IOD next contends that the district court erred in awarding prejudgment interest without first finding that IOD was responsible for any delay. This claim is devoid of merit. An award of prejudgment interest in an admiralty case is within the district court's sound discretion, *e.g.*, *Williams v. Reading & Bates Drilling Co.*, 750 F.2d 487 (5th Cir. 1985); *Curry v. Fluor Drilling*, and does not depend on evidence of delay. "In fact, generally in maritime law, prejudgment interest should be awarded." *Curry v. Fluor Drilling*, 715 F.2d at 896 (citations omitted). *See also Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191, 1196 (5th Cir. 1982) ("As a general rule, prejudgment interest should be awarded in admiralty cases—not as a penalty, but as compensation for the use of funds to which the claimant was rightfully entitled." (*quoting Noritake Co. v. M/V Helenic Champion*, 627 F.2d 724, 728 (5th Cir. 1980))). The district judge found no "peculiar circumstances" that would make it inequitable to assess prejudgment interest, thereby accurately tracking the law of the circuit, *see Doucet v. Wheless Drilling Co.*, 467 F.2d 336, 340 (5th Cir. 1972). We find no abuse of discretion in the award of prejudgment interest on damages for all losses that occurred prior to trial.

[3] The testimony concerning Pickle's potential employment as a diving supervisor at a rate far in excess of the minimum wage is not relevant to this contention of IOD's, for it was conceded that due to his back injury, Pickle was ineligible for this supervisory job.

[7] IOD further maintains that the court erred by awarding prejudgment interest on damages for loss of future income and for future pain and suffering. That challenge is meritorious as it relates to the interest on damages for future pain and suffering. Agreeing with IOD's argument on this point, we must vacate so much of the judgment as is necessary to empower the district court on remand to reconsider the award of prejudgment interest on post-judgment losses.[4]

[8] Claiming that this is a question of first impression, Pickle argues that the general rule prohibiting prejudgment interest on post-judgment losses should be modified in order to allow such interest where future losses have been discounted to present value. We note first that this is not a question of first impression for us. As the *Williams* court categorically declared, "Prejudgment interest . . . may not be awarded with respect to future damages." *Williams*, 750 F.2d at 491. Moreover, Pickle's argument ignores the basic rationale for denying interest on post-judgment losses: a victorious plaintiff has not suffered any delay in payment of those items, whether they have been discounted to present value or not, and hence there should be no prejudgment interest allowed on them. *See generally Wyatt v. Penrod Drilling Co.*, 735 F.2d 951 (5th Cir. 1984); *Hamilton v. Canal Barge Co.*, 395 F.Supp. 978 (E.D.La. 1975) (Rubin, J.).[5] We therefore vacate that part of the judgment and remand this question to the court *a quo* for a recalculation of prejudgment interest, excluding therefrom interest on future, unaccrued damages.

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[4] Although the portion of the judgment for lost future income and benefits is clearly indentifiable, remand is necessary in order to allow the district court to determine how much of the general award for pain and suffering represents a post-judgment recovery.

[5] In so stating we underscore, however, that as to economic losses this dispute is to be resolved pursuant to the rule of *Culver I*, 688 F.2d 280 (5th Cir. 1982) (*en banc*). *Culver II*, 722 F.2d 114 (5th Cir. 1983) (*en banc*), applies only to cases decided thereafter.

Failure to Deduct Social Security Taxes.

Finally, IOD correctly argues that the district court erred in not deducting social security taxes from its estimate of Pickle's future income. This point, however, was not made by formal objection, or by questioning during IOD's rigorous and thorough cross-examination of Pickle's expert economist, or after trial by a Fed.R.Civ.P. 59 motion, and thus has not been preserved for appeal. *See Madore v. Ingram Tank Ships, Inc.*

Structuring of Judgment and Reimbursements.

In addressing this troublesome issue, we first note that Pickle has not filed a cross-appeal contesting the judgment's structure or the reimbursals ordered. He merely argues in his reply brief that the $26,000 reimbursement to IOD and $13,097.60 of the reimbursement to Maryland Casualty represented maintenance and should not be credited, off-set, of (sic) reimbursed. The arguments before us concerning reimbursement are those of Underwriters, the intervenors-on-appeal.

Underwriters argues that the judgment will reimburse Maryland Casualty for money it was contractually obligated to pay, thereby making Underwriters liable for a primary amount even though it is only the excess insurer. Maryland Casualty candidly concedes that it should not have been reimbursed for amounts paid Pickle up to its policy limits of $25,000, but apparently would restrict its claim for reimbursement to the sum of $6,919.52, the amount assertedly paid in excess of those limits. Maryland Casualty's claim is based on evidence presented only to this court. We may not and do not consider it. *See Scar-*

borough v. Dellum, 525 F.2d 931 (5th Cir. 1976); *Smith v. United States*, 343 F.2d 539 (5th Cir.), *cert. denied*, 382 U.S. 861 (1965). Maryland Casualty may not increase the reimbursal amount *ex parte* on appeal. *See supra*, n.2. But its concession that it should not have been reimbursed for its policy limits is laudatory and appropriate, and we perceive no just reason for completely extinguishing its reimbursal award, provided the claim of Underwriters receives appropriate consideration on remand.

[9] Underwriters' motion to intervene on appeal consists, essentially, of a claim that because of the structuring and phrasing of the reimbursal judgment, it should be considered a necessary and indispensible party under Fed.R.Civ.P. 19(a) & (b). Although the original defendants failed to present this defense to the trial court, their failure does not prevent our considering it on appeal, *United States v. Sabine Shell, Inc.*, 674 F.2d 480 (5th Cir. 1982); *McCulloch v. Glasgow*, 620 F.2d 47 (5th Cir. 1980), especially when prior to the enunciation of the judgment, Underwriters had no reason to believe that the disposition of this suit would "impair or impede" their ability to protect their interests. Fed.R.Civ.P. 19(a)(2)(i). Moreover, a Rule 19 objection can even be noticed on appeal by the reviewing court *sua sponte*. *Provident Trademens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 19 L.Ed.2d 936 (1968); *Kimball v. Florida Bar*, 537 F.2d 1305 (5th Cir. 1976).

[10] Although we today recognize the existence of this joinder issue, we do not find it fit for resolution at this juncture:

> We could not resolve this issue without additional briefs examining each of the factors enumerated in Rule 19, and we would have to remand in any case if we held for [intervenor] on

> this issue. Therefore, we think it appropriate to remand in the first instance so that . . . the district court can determine whether the [intervenor] can or should have been joined under the provisions of Rule 19.

Kimball, 537 F.2d at 1307. These same considerations mandate that we vacate that part of the judgment concerning reimbursals to Maryland Casualty and remand for a reconsideration of that issue, and for consideration of the claims of Underwriters, including the threshold question whether they should now be allowed an opportunity to present their claims.

For his part, Pickle contends that $13,097.60 of the sum paid him by Maryland Casualty represented maintenance and should not have been reimbursed. Because there has been no cross-appeal, that contention is not properly before us. We therefore do not address Pickle's argument that the $26,000 received from IOD was for maintenance and should not have been the subject of reimbursement.[6]

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[6] Implicit in the trial court's structuring of the judgment is adherence to the rule that double recovery is to be avoided. There may be some portions of the sums reimbursed to Maryland Casualty and IOD, however, which represented maintenance independent of lost past wages or other damages. Although the complaint and opinion refer to maintenance and cure, part of the award was for past fringe benefits (meals aboard ship) and part was for future fringe benefits of that kind. While payments for meals before maximum cure has been achieved can often be regarded as part of maintenance, any award for loss of future fringe benefits after maximum cure has been achieved, and the duty to pay maintenance has therefore ended, can only constitute the oft-overlooked award in admiralty for "found." *See generally*, Normann, *Has Found Been Lost? An Analysis of a Seldom Utilized Concept in the Maritime Law*, 30 Loy.L.Rev. 875, 877 (1984) ("Pursuant to present case law, the plaintiff injured [while in the service of the ship] would recover maintenance through the date his physician declared his disability to be permanent, and at that point his claim for found may become viable. Hence, the prevailing view is that he may not recover maintenance and found for the same period, but once maintenance terminates he may be entitled to found. In this sense, the recoveries are mutually exclusive, but only within the same time frame.").

For these reasons, we conclude that the prevailing law and the interests of justice and judicial economy require that we vacate parts of the judgment and remand this matter to the trial court for further proceedings consistent herewith.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

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A-31

July 29, 1986

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

No. 84-4348 - Pickle vs. International Oilfield

Dear Counsel:

At the Court's direction, I am enclosing a corrected page 6849 to the opinion rendered in the referenced appeal on June 16, 1986.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By S/S Betty G. Martinez
Deputy Clerk

cc and enclosure to:

Messrs. Joel L. Borrello
Lynn M. Luker
Messrs. Owen M. Goudelocke
John A. Jeansonne, Jr.
Craig W. Marks
Mr. Charles Carmelo Culotta, Jr.
Mr. Lawrence K. Burleigh
Messrs. Edward J. Marquet
John K. Hill, Jr.

clearly erroneous. *Kratzer v. Capital Marine Supply, Inc.*, 645 F.2d 477 (5th Cir. 1981).

[4] As a Jones Act employer, IOD must bear responsibility for Connell's negligence "if such negligence played any part, *even the slightest*, in producing the injury." *Theriot v. J. Ray McDermott & Co.*, 742 F.2d 877, 881 (5th Cir. 1984) (emphasis in original). In light of the fact that Pickle's duty to protect himself is only a slight duty to use reasonable care, *Bobb v. Modern Products, Inc.*, 648 F.2d 1051 (5th Cir. 1981), we find no error in the district court's findings and conclusions.

Excessive Award.

1. *Future Wages*

[5] IOD maintains that the trial judge overestimated Pickle's lost future wages by ignoring the possibility that he might be employed at a pay scale in excess of the federal minimum wage and by failing to credit properly a medical report indicating that because of pulomary disease not related to the accident, Pickle's future as a diver was limited. Recognizing that an employee's work-life expectancy may be affected by evidence of his poor health, *Madore v. Ingram Tanks Ships, Inc.*, 732 F.2d 475 (5th Cir. 1984), the district court found that Pickle would have been employed by IOD as a diving supervisor when his diving career ended. This finding, based on testimony by IOD's president, is not clearly erroneous. It was therefore not an abuse of discretion, *see Curry v. Fluor Drilling Services*, 715 F.2d 893 (5th Cir. 1983), for the court to ignore the evidence of Pickle's pulmonary condition, which would not

have affected his career as a diving supervisor. Insofar as IOD challenges the award for failure to consider employment above the minimum wage, this finding is not shown to be clearly erroneous. The evidence of such employability was random and speculative.[3]

[3] The testimony concerning Pickle's potential employment as a diving supervisor at a rate far in excess of the minimum wage is not relevant to this contention of IOD's, for it was conceded that due to his back injury, Pickle was ineligible for this supervisory job.

Lonnie PICKLE, Plaintiff-Appellee,
Maryland Casualty Company,
Intervenor-Appellee,

v.

INTERNATIONAL OILFIELD DIVERS, INC. Defendant-Appellant.

No. 84-4348

United States Court of Appeals,
Fifth Circuit

June 16, 1986.

Rehearing and Rehearing En Banc
Denied July 30, 1986.

Diver employed to construct underwater brace on fixed oil platform, who was injured while diving in rough seas, sued under Jones Act and general maritime law for personal injuries and maintenance and cure. The United States District Court, Western District of Louisiana, John M. Shaw, J., entered judgement for diver, and employer and casualty insurer appealed. Excess casualty insurer moved to intervene. The Court of Appeals, Politz, Circuit Judge, held that: (1) finding that diver was Jones Act "seaman" was not clearly erroneous; (2) finding that diver was not contributorily negligent for diving in six to eight-foot swells was not clearly erroneous; and (3) award of pre-judgment interest on diver's postjudgment losses constituted abuse of discretion.

Affirmed in part, vacated, in part and remanded.

1. Seamen 29(5.14)

Finding that professional diver, who spent approximately 90% of work time aboard identifiable fleet of

barges, qualified as "seaman" for purposes of Jones Act was not clearly erroneous. Jones Act, 46 U.S.C.A. § 688.

2. Seamen 29(4)

Jones Act "seaman" is required to exercise only slight and not ordinary care to protect himself, for purpose of employer's claim in Jones Act case that seaman was injured as result of own, contributory negligence. Jones Act, 46 U.S.C.A. § 688.

3. Seamen 29(5.14)

Finding that Jones Act "seaman" was not contributorily negligent was not clearly erroneous, though seaman had obeyed supervisor's orders and dived in six to eight-foot ocean swells. Jones Act, 46 U.S.C.A. § 688.

4. Damages 100

Finding that Jones Act "seaman," would have been employed as diving supervisor when pulmonary condition precluded him from working as diver was not clearly erroneous, so that trial could ignore evidence of seaman's pulmonary condition in awarding damages for injury sustained while diving. Jones Act, 46 U.S.C.A. § 688.

5. Interest 39(2.25)

Award of prejudgment interest in admiralty case is within trial court's sound discretion.

6. Interest 39(2.25)

Award of prejudgment interest in admiralty case does not depend on evidence of delay.

7. Interest 39(2.25)

Award of prejudgment interest on Jones Act seaman's postjudgment losses constituted abuse of discretion, though future losses had been discounted to present value. Jones Act, 46 U.S.C.A. § 688.

8. Damages 100

Estimates of Jones Act seaman's lost future wages should have been reduced, for purposes of damages award in Jones Act case, by social security which would have

been due on wages. Jones Act, 46 U.S.C.A. § 688.

9. Federal Courts 634, 640

Employer's objection to trial court's calculation of employee's damages in Jones Act case, which were not raised at trial or by Rule 59 motion, were not preserved for appeal. Jones Act, 46 U.S.C.A. § 688; Fed. Rules Civ.Proc.Rule 59, 28 U.S.C.A.

10. Federal Courts 623

Rule 19 objection can be noticed on appeal by reviewing court sua sponte. Fed.Rules Civ.Proc.Rule 19, 28 U.S.C.A.

Craig W. Marks, Owen M. Goudelocke, John A. Jeansonne, Jr., Lafayette, La., Joel L. Borrello, Adams & Reese, Lynn M. Luker, New Orleans, La., for Intern. & Intervenors (Fisher and Jennings).

Lawrence K. Burleigh, Ltd., Morgan City, La., Culotta & Morella, Charles Carmelo Culotta, Jr., Patterson, La., for plaintiff-appellee.

Edward J. Marquet, John K. Hill, Jr., Lafayette, La., for Maryland Cas. Co.

Appeal from the United States District Court for the Western District of Louisiana.

Before GARZA, POLITZ, and HILL, Circuit Judges.

POLITZ, Circuit Judge:

This is an appeal from a Jones Act judgment after a bench trial, and involves, *inter alia*, the application of the rule recently announced in *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986) (*en banc*). Finding no mreit in

the challenges mounted against the district court's findings on seaman status, defendant's negligence, and plaintiff's contributory negligence, we affirm on those issues. We vacate the judgment as cast, however, and remand for a reconsideration of the award of prejudgment interest and for consideration, as the court may find appropriate, of the contentions of intervenor Underwriters of Lloyd's of London (Underwriters) concerning the structuring of the mandated reimbursements to Maryland Casualty Company and International Oilfield Divers (IOD), and of the other issues discussed herein.

BACKGROUND

Lonnie Pickle, an experienced diver, was employed by IOD and was lead diver of a crew constructing an underwater brace on a fixed platform owned by ETPM-U.S.A., Inc. (ETPM) in the Gulf of Mexico off the coast of Texas. Because Pickle had to interrupt the hitch to attend a funeral, Jim Connell became lead diver for the remainder of the work assignment. The IOD crew was stationed on ETPM Barge 701 for the duration of the job.

While making his second dive on January 29, 1978, Pickle injured his back when a surge of water threw him against the jacket leg of the platform. The seas were rough, with six-to-eight foot swells, and Pickle had experienced some difficulty on his first dive that day.

Invoking the Jones Act, 46 U.S.C. § 688, and the general maritime law, Pickle sued IOD and ETPM for damages for personal injury and maintenance and cure.[1] The trial court found that Pickle was a seaman because of his assignment to ETPM Barge 701 at the time of the acci-

[1] The claim against ETPM was dismissed.

dent and because 90% of his work for IOD during his three years of employment had been aboard vessels in the Gulf of Mexico. The trial court found IOD negligent because its supervisor, Connell, had failed to stop the diving during heavy seas, and it found that Pickle had not been contributorily negligent. Damages of $494,713.37 plus pre-and post-judgment interest were awarded.

In structuring the award, the court awarded Maryland Casualty, IOD's primary insurer, reimbursement totaling $29,354.19 and also allowed IOD $26,000 for sums previously paid on Pickle's behalf.[2] These sums were deducted from Pickle's award. IOD appeals.

After the appeal was noticed, Underwriters petitioned this court for leave to intervene, explaining that they provided employer's liability insurance to IOD for all sums in excess of the $25,000 primary coverage of Maryland Casualty. Because Maryland Casualty did not appeal, and recognizing the obvious vital interest of Underwriters, we granted their petition to intervene.

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Seaman status.

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[2] On appeal Maryland Casualty moved to supplement the record to show that it had actually expended $31,919.52 for Pickle. We granted the motion to supplement but deferred deciding whether the additional proof would be used in the resolution of any issue on appeal. Since we are remanding, we leave to the discretion of the district court whether the judgment should be amended, with or without the taking of further evidence, relative to this claim of Maryland Casualty, for the reasons discussed *infra*.

In *Barrett*, the *en banc* court revisited *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959), and reviewed the test for seaman status articulated there. A unanimous court reaffirmed the two-part *Robison* test which categorizes a maritime worker as a Jones Act seaman if he (1) "was assigned permanently to a vessel or performed a substantial part of his work on the vessel," and (2) "contributed to the function of the vessel or to the accomplishment of its mission." *Barrett*, 781 F.2d at 1072. Recognizing that the second prong of the test is easily determined under the Supreme Court's broad definition of "aid to navigation," *id.*, we focused primarily on refining the first prong of the *Robison* test. To this end, we directed our attention to the duration of an employee's assignment to a vessel or fleet of vessels, to the definition of a fleet, and to the question of substantial performance.

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Id. at 1073-74 (citations and footnotes omitted). We completed the definitional process by stating: "By fleet we mean an identifiable group of vessels acting together or under one control." *Id.* at 1074.

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The trial court found that Pickle spent 90% of his work-time during his employment with IOD aboard an identifiable fleet of barges. In addition, as "a commercial diver, who embodies the traditional and inevitably maritime task of navigation, [Pickle had] the legal protections of a seaman when a substantial part of his duties are performed on vessels." *Wallace v. Oceaneering Int'l*, 727 F.2d 427, 436 (5th Cir. 1984). This is so because "[i]t is the inherently maritime nature of the tasks performed and perils faced by his profession, and not the fortuity of his tenure on the vessel from which he makes a particular dive on which he was injured, that makes [Pickle] a seaman." *Id.* We perceive no erroneous fact-finding and no error of law in the trial court's determination that Pickle was a seaman.

Negligence and contributory negligence.

Without conceding but, understandably, without vigorously challenging the finding that it was negligent, IOD contends that the district court erred in finding no contributory negligence on Pickle's part. IOD argues that as an experienced diver, Pickle should have been more careful by refusing Connell's directions to dive. The court's findings on this point will not be overturned unless clearly erroneous. *Kratzer v. Capital Marine Supply, Inc.*, 645 F.2d 477 (5th Cir. 1981).

[2,3] As a Jones Act employer, IOD must bear responsibility for Connell's negligence "if such negligence played any part, *even the slightest*, in producing the injury." *Theriot v. J. Ray McDermott & Co.*, 742 F.2d 877, 881 (5th Cir. 1984) (emphasis in original). In light of the fact that Pickle's duty to protect himself is only a slight duty to use reasonable care, *Bobb v. Modern Products, Inc.*, 648 F.2d 1051 (5th Cir. 1981), we find no error in the district court's findings and conclusions.

Excessive award.

1. Future wages

[4] IOD maintains that the trial judge overestimated Pickle's lost future wages by ignoring the possibility that he might be employed at a pay scale in excess of the federal minimum wage and by failing to credit properly a medical report indicating that because of pulmonary disease not related to the accident, Pickle's future as a diver was limited. Recognizing that an employee's work-life expectancy may be affected by evidence of his poor health, *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475 (5th Cir.

1985), the district court found that Pickle would have been employed by IOD as a diving supervisor when his diving career ended. This finding, based on testimony by IOD's president, is not clearly erroneous. It was therefore not an abuse of discretion, *see Curry v. Fluor Drilling Services*, 715 F.2d 893 (5th Cir. 1983), for the court to ignore the evidence of Pickle's pulmonary condition, which would not have affected his career as a diving supervisor. Insofar as IOD challenges the award for failure to consider employment above the minimum wage, this finding is not shown to be clearly erroneous. The evidence of such employability was random and speculative.[3]

2. Prejudgment interest

[5,6] IOD next contends that the district court erred in awarding prejudgment interest without first finding that IOD was responsible for any delay. This claim is devoid of merit. An award of prejudgment interest in an admiralty case is within the district court's sound discretion, *e.g.*, *Williams v. Reading & Bates Drilling Co.*, 750 F.2d 487 (5th Cir. 1985); *Curry v. Fluor Drilling*, and does not depend on evidence of delay. "In fact, generally in maritime law, prejudgment interest should be awarded." *Curry v. Fluor Drilling*, 715 F.2d at 896 (citations omitted). *See also Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191, 1196 (5th Cir. 1982) ("As a general rule, prejudgment interest should be awarded in admiralty cases—not as a penalty, but as compensation for the use of funds to which the claimant was rightfully entitled.") The district judge found no "peculiar circumstances" that would make it inequitable to assess prejudgment interest, thereby accurately tracking the law of

[3] The testimony concerning Pickle's potential employment as a diving supervisor at a rate far in excess of the minimum wage is not relevant to this contention of IOD's, for it was conceded that due to his back injury, Pickle was ineligible for this supervisory job.

the circuit, *see Doucet v. Wheless Drilling Co.*, 467 F.2d 336, 340 (5th Cir. 1972). We find no abuse of discretion in the award of prejudgment interest on damages for all losses that occurred prior to trial.

[7] IOD further maintains that the court erred by awarding prejudgment interest on damages for loss of future income and for future pain and suffering. That challenge is meritorious as it relates to the interest on damages for future pain and suffering. Agreeing with IOD's argument on this point, we must vacate so much of the judgment as is necessary to empower the district court on remand to reconsider the award of prejudgment interest on post-judgment losses.[4]

Claiming that this is a question of first impression, Pickle argues that the general rule prohibiting prejudgment interest on post-judgment losses should be modified in order to allow such interest where future losses have been discounted to present value. We note first that this is not a question of first impression for us. As the *Williams* court categorically declared, "Prejudgment interest . . . may not be awarded with respect to future damages." *Williams*, 750 F.2d at 491. Moreover, Pickle's argument ignores the basic rationale for denying interest on post-judgment losses: a victorious plaintiff has not suffered any delay in payment of those items, whether they have been discounted to present value or not, and hence there should be no prejudgment interest allowed on them. *See generally Wyatt v. Penrod Drilling Co.*, 735 F.2d 951 (5th Cir. 1984); *Hamilton v. Canal Barge Co.*, 395 F.Supp. 978 (E.D.La.

[4] Although the portion of the judgment for lost future income and benefits is clearly identifiable, remand is necessary in order to allow the district court to determine how much of the general award for pain and suffering represents a post-judgment recovery.

1975) (Rubin, J.).[8] We therefore vacate that part of the judgment and remand this question to the court *a quo* for a recalculation of prejudgment interest, excluding therefrom interest on future, unaccrued non-economic damages.

Failure to deduct social security taxes.

[8,9] Finally, IOD correctly argues that the district court erred in not deducting social security taxes from its estimate of Pickle's future income. This point, however, was not made by formal objection, or by questioning during IOD's rigorous and thorough cross-examination of Pickle's expert economist, or after trial by a Fed.R.Civ.P. 59 motion, and thus has not been preserved for appeal. *See Madore v. Ingram Tank Ships, Inc.*

Structuring of judgment and reimbursements.

In addressing this troublesome issue, we first note that Pickle has not filed a cross-appeal contesting the judgment's structure or the reimbursals ordered. He merely argues in his reply brief that the $26,000 reimbursement to IOD and $13,097.60 of the reimbursement to Maryland Casualty represented maintenance and should not be credited, off-set, or reimbursed. The arguments before us concerning reimbursement are those of Underwriters, the intervenors-on-appeal.

Underwriters argues that the judgment will reimburse Maryland Casualty for money it was contractually obligated to pay, thereby making Underwriters liable for a primary amount even though it is only the excess insurer.

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[8] In so stating we underscore, however, that as to economic losses this dispute is to be resolved pursuant to the rule of *Culver I, 688 F.2d 280 (5th Cir. 1982) (en banc)*. *Culver II,* 722 F.2d 114 (5th Cir. 1983) (*en banc*), applies only to cases decided thereafter.

Maryland Casualty candidly concedes that it should not have been reimbursed for amounts paid Pickle up to its policy limits of $25,000, but apparently would restrict its claim for reimbursement to the sum of $6,919.52, the amount assertedly paid in excess of those limits. Maryland Casualty's claim is based on evidence presented only to this court. We may not and do not consider it. *See Scarborough v. Kellum,* 525 F.2d 931 (5th Cir. 1976); *Smith v. United States,* 343 F.2d 539 (5th Cir.), *cert. denied,* 382 U.S. 861, 86 S.Ct. 122, 15 L.Ed.2d 99 (1965). Maryland Casualty may not increase the reimbursal amount *ex parte* on appeal. *See supra,* n.2. But its concession that it should not have been reimbursed for its policy limits is laudatory and appropriate, and we perceive no just reason for completely extinguishing its reimbursal award, provided the claim of Underwriters receives appropriate consideration on remand.

[10] Underwriters' motion to intervene on appeal consists, essentially, of a claim that because of the structuring and phrasing of the reimbursal judgement, it should be considered a necessary and indispensible party under Fed.R.Civ.P. 19(a) & (b). Although the original defendants failed to present this defense to the trial court, their failure does not prevent our considering it on appeal, *United States v. Sabine Shell, Inc.,* 674 F.2d 480 (5th Cir. 1982); *McCulloch v. Glasgow,* 620 F.2d 47 (5th Cir. 1980), especially when prior to the enunciation of the judgment, Underwriters had no reason to believe that the disposition of this suit would "impair or impede" their ability to protect their interests. Fed.R.Civ.P. 19(a)(2)(i). Moreover, a Rule 19 objection can even be noticed on appeal by the reviewing court *sua sponte. Provident Trademens Bank & Trust Co. v. Patterson,* 390 U.S. 102, 88 S.Ct. 733, 19

L.Ed.2d 936 (1968); *Kimball v. Florida Bar,* 537 F.2d 1305 (5th Cir. 1976).

Although we today recognize the existence of this joinder issue, we do not find it fit for resolution at this juncture:

> We could not resolve this issue without additional briefs examining each of the factors enumerated in Rule 19, and we would have to remand in any case if we held for [intervenor] on this issue. Therefore, we think it appropriate to remand in the first instance so that . . . the district court can determine whether the [intervenor] can or should have been joined under the provisions of Rule 19.

Kimball, 537 F.2d at 1307. These same considerations mandate that we vacate that part of the judgment concerning reimbursals to Maryland Casualty and remand for a reconsideration of that issue, and for consideration of the claims of Underwriters, including the threshold question whether they should now be allowed an opportunity to present their claims.

For his part, Pickle contends that $13,097.60 of the sum paid him by Maryland Casualty represented maintenance and should not have been reimbursed. Because there has been no cross-appeal, that contention is not properly before us. We therefore do not address Pickle's argument that the $26,000 received from IOD was for maintenance and should not have been the subject of reimbursement.[6]

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[6] Implicit in the trial court's structuring of the judgment is adherence to the rule that double recovery is to be avoided. There may be some portions of the sums reimbursed to Maryland Casualty and IOD, however, which represented maintenance independent of lost past wages

For these reasons, we conclude that the prevailing law and the interests of justice and judicial economy require that we vacate parts of the judgment and remand this matter to the trial court for further proceedings consistent herewith.

AFFIRMED IN PART, VACATED, IN PART AND REMANDED.

Editor's Note: The opinion of the United States Court of Appeals, Fifth Circuit in *United States v. Arroyo*, published in the advance sheet at this citation, 791 F.2d 1243-1244, was withdrawn from the bound volume because the opinion was withdrawn by order of the Court on grant of rehearing.

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or other damages. Although the complaint and opinion refer to maintenance and cure, part of the award was for past fringe benefits (meals aboard ship) and part was for future fringe benefits of that kind. While payments for meals before maximum cure has been achieved can often be regarded as part of maintenance, any award for loss of future fringe benefits after maximum cure has been achieved, and the duty to pay maintenance has therefore ended, can only constitute the oft-overlooked award in admiralty for "found." *See generally*, Normann, *Has Found Been Lost? An Analysis of a Seldom Utilized Concept in the Maritime Law*, 30 Loy.L.Rev. 875, 877 (1984) ("Pursuant to present case law, the plaintiff injured [while in the service of the ship] would recover maintenance through the date his physician declared his disability to be permanent, and at that point his claim for found may become viable. Hence, the prevailing view is that he may not recover maintenance and found for the same period, but once maintenance terminates he may be entitled to found. In this sense, the recoveries are mutually exclusive, but only within the same time frame.").

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

LONNIE PICKLE
VS.
INTERNATIONAL OILFIELD DIVERS, INC.

CIVIL ACTION NUMBER 80-1955
SECTION S

OPINION

This case involves a claim under the Jones Act by Lonnie Pickle, a diver, against his employer, International Oilfield Divers, Inc. (IOD) for personal injuries sustained by him due to the negligence of the diver in charge. All other claims were disposed of prior to trial and the matter came on before this Court, without a jury, on November 21, 1983. The Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1.

Plaintiff, Lonnie Pickle, a diver for IOD, injured his back on January 29, 1978 approximately fifteen (15') feet below the waterline when a surge of water thrust him

against the jacket leg of a fixed offshore platform located in Block 120, Matagorda Island, Offshore Port O'Connor, Texas, in the Gulf of Mexico.

2.

The platform was being constructed for Corpus Christi Oil and Gas Company by ETPM, U.S.A., Inc. (ETPM), and plaintiff was assigned to dive off the ETPM Barge 701 pursuant to a contract between ETPM and IOD, calling for the latter to furnish divers.

3.

At the time of the accident the plaintiff was diving from the platform rather than the Barge 701 due to the location of the work to be performed that morning, which necessitated the setting of a pin to secure a brace that ran from a conductor to a gusset plate adjacent to the jacket leg of the platform.

4.

Plaintiff went underwater around 11:05 on the morning of the accident and was injured shortly thereafter but completed his job and returned to the surface at 11:45. Approximately fifteen minutes later all diving was terminated due to rough weather.

5.

Plaintiff began working as a diver in 1965 and with IOD since it was formed in 1975. From 1975 until the job in question, IOD either secured or was provided for its diving

operations, two barges from Cobb Offshore, the Norman Barges, Pipefitter 3 & 7 and McDermott Barges 16, 21, 22. Approximately ninety (90%) per cent of the plaintiff's assignments during this period was on the Pipefitter 3 and 7 and the jobs lasted from three (3) to forty-five (45) days. At the time of the accident, IOD did not own any vessels.

6.

Plaintiff was assigned to the job in the instant case on January 9, 1978 as lead diver, with two additional crew members. On January 11, 1978 plaintiff left the job to attend a funeral and returned on January 26, 1978. During his absence Jim Connell, an employee for IOD, was dispatched to the 701 to replace plaintiff as lead diver in charge of the job and Connell remained in that capacity until the crew went ashore on February 1, 1978 at which time only ten (10%) per cent of IOD's work had been completed.

7.

The seas were four to eight feet (4'8') when plaintiff made his last scheduled dive and increased substantially and rapidly until he came out of the water. It has been stipulated that the seas were rough at the time of the alleged injury. (Pre-trial Stipulation 5D).

8.

The final authority vests with the lead diver to determine whether or not it is safe to dive. Jim Connell, the lead diver, prepared the diving schedule and although plaintiff did not protest prior to making his fateful dive, Connell did not call it off. As plaintiff said, "When it came my time, I dove." His was not to reason why. Once down, plaintiff per-

formed his work in as safe and proper a manner as was possible under the circumstances.

9.

The plaintiff promptly reported the accident to John Andresen, a co-employee, but felt that he would not require medical attention. However, plaintiff's condition did not improve and he promptly sought medical attention which necessitated two lumbar disc operations. As a result of the accident plaintiff has sustained a permanent disability rendering him unable to return to his former occupation as a diver or accept employment as a diving supervisor with the same pay scale.

10.

Plaintiff was earning TWENTY THOUSAND AND NO/100 ($20,000.00) DOLLARS annually at the time of the accident and would have been employed by IOD as a diving supervisor at the termination of his diving career. Divers and supervisors earn the same rate of pay.

11.

The evidence reveals that if plaintiff would be employed by IOD at the present time as a diver or supervisor he would earn FORTY THOUSAND AND NO/100 ($40,000.00) DOLLARS annually. This indicates wage increases to date in excess of the average annual percentage increases projected by Dr. Goodman of 7.99% (adjusted to 7.92%) for the year 1979 and all subsequent years of plaintiff's work life expectancy. With such high wage increases from 1978 to 1983, the Court must conclude that the

percentage of increase in earnings for divers and supervisors over the remainder of plaintiff's work life will likely decline, flatten out or even become negative during certain periods, where in the end the percentages and the dollars should conform to Dr. Goodman's projections, based on statistics concerning oil and gas service production workers in the nation as a whole from 1965 to 1983. In short, the Court does not feel that it would be realistic to use a FORTY THOUSAND AND NO/100 ($40,000.00) DOLLAR wage base from date of trial and project an annual increase of 7.92% to end of plaintiff's work life expectancy.

12.

Plaintiff was born on July 13, 1934 and was forty-nine (49) years old at the time of trial and had a work life expectancy of 12.6 years, according to plaintiff's economist, Dr. Seymore Goodman.

13.

From date of accident to trial, plaintiff sustained an after-tax loss of income of ONE HUNDRED TWENTY-SIX THOUSAND TWELVE AND 76/100 ($126,012.76) DOLLARS and fringe benefits consisting of meals furnished by his employer of NINETEEN THOUSAND FORTY-THREE AND 81/100 ($19,043.81) DOLLARS. From date of trial to end of the plaintiff's work life expectancy plaintiff sustained an after-tax loss of income of TWO HUNDRED NINETY-SEVEN THOUSAND SIX HUNDRED FORTY-SIX AND 14/100 ($297,646.14) DOLLARS and fringe benefits (meals) of THIRTY-SIX THOUSAND FOUR HUNDRED TWENTY-SIX AND 75/100 ($36,426.75) DOLLARS.

14.

Plaintiff had a life expectancy at the date of trial of 25.6 years and has endured severe pain and suffering as a result of the accident and subsequent surgeries and will continue to experience moderate to severe pain and suffering in the future.

15.

Maryland Casualty Company has paid THIRTEEN THOUSAND NINETY-SEVEN AND 60/100 ($13,097.60) DOLLARS in compensation and SIXTEEN THOUSAND TWO HUNDRED FIFTY-SIX AND 59/100 ($16,256.59) DOLLARS in medical payments and seeks reimbursement out of any judgment that plaintiff would receive. Additionally, IOD paid plaintiff TWENTY-SIX THOUSAND AND NO/100 ($26,000.00) DOLLARS in benefits.

16.

The evidence reveals that the plaintiff may require future medical expenses in the amount of TWELVE THOUSAND FIVE HUNDRED AND NO/100 ($12,500.00) DOLLARS if he needs to undergo a disc fusion. There remains outstanding a bill in the amount of FOUR THOUSAND FORTY-EIGHT AND 50/100 ($4,048.50) from the University of Texas Medical School for medical treatment of plaintiff which IOD has not paid.

17.

The plaintiff was capable of gainful employment at the minimum wage in an occupation that would not abuse his

back as of September 29, 1981, the date of plaintiff's last examination by Dr. Michael Miner, his attending orthopaedic surgeon.

18.

The record indicates that plaintiff has been paid more than the amount of maintenance and cure due and is not entitled to punitive damages.

CONCLUSIONS OF LAW

1.

This Court has jurisdiction of this action and venue is properly laid in the Western District of Louisiana. 46 U.S.C. § 688.

2.

Plaintiff, Lonnie Pickle, was a seaman and member of the crew of the ETPM Barge 701, and would also qualify as a member of the crew of a specific group of vessels consisting of the Norman Barges, Pipefitter 3 & 7, McDermott Barges 16, 21, 22, on which plaintiff spent approximately ninety (90%) per cent of his time in 1975, 1976 and 1977. *Roberts v. Williams-McWilliams Co., Inc.* 648 F.2d 255 (5th Cir. 1981); *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983); *Taylor v. Packer Diving and Salvage Co., Inc.*, 342 F.Supp. 365 (E.D. La. 1971), aff'd, 457 F.2d 512 (5th Cir. 1972).

3.

The lead diver for IOD, Jim Connell, was negligent in causing the plaintiff to do underwater work in rough seas which caused the plaintiff's injuries and the plaintiff was entirely free of any negligence. Plaintiff's duty was to do his work as he was instructed. He was in no sense obligated to protest against the method of operation which he had been instructed to follow. A seaman's duty to protect himself is slight. *Spinks v. Chevron Oil Company*, 507 F.2d 216 (5th Cir. 1975).

4.

Plaintiff is entitled to an award against IOD for past lost earnings and fringe benefits of ONE HUNDRED FORTY-FIVE THOUSAND FIFTY-SIX AND 57/100 ($145,056.57) and for future lost earnings and fringe benefits of THREE HUNDRED THIRTY-FOUR THOUSAND SEVENTY-TWO AND 39/100 ($334,072.39) DOLLARS.

5.

Plaintiff is entitled to EIGHTY-FIVE THOUSAND AND NO/100 ($85,000.00) DOLLARS as compensation for general damages, including pain and suffering, past, present and future.

6.

Plaintiff is entitled to recover FOUR THOUSAND FORTY-EIGHT AND 50/100 ($4,048.50) DOLLARS for past medical expenses incurred at the University of Texas

Medical School, Houston, and additionally, the SIXTEEN THOUSAND TWO HUNDRED FIFTY-SIX AND 59/100 ($16,256.59) DOLLARS in medical expenses paid by Maryland Casualty Company.

7.

Intervenor, Maryland Casualty Company, is entitled to be reimbursed out of the plaintiff's recovery, the sum of THIRTEEN THOUSAND NINETY-SEVEN AND 60/100 ($13,097.60) in compensation and SIXTEEN THOUSAND TWO HUNDRED FIFTY-SIX AND 50/100 ($16,256.59) DOLLARS in medical paid.

8.

IOD is entitled to be reimbursed out of the plaintiff's recovery the sum of TWENTY-SIX THOUSAND AND NO/100 ($26,000.00) DOLLARS paid to the plaintiff.

9.

The plaintiff is not entitled to any award for future medical expenses and in the event a lumbar fusion becomes necessary in the future, he can pursue a claim for cure against his employer.

10.

The plaintiff is not entitled to an award for punitive damages.

11.

The award to the plaintiff will be reduced by the amount plaintiff would earn at the minimum wage rate

from September 29, 1981 to end of work life expectancy. The parties will apply an annual percentage rise in the minimum wages based on an appropriate period customarily used in the past, and in the absence of an agreement on same within ten (10) days of this judgment, the Court will reopen the note of evidence for expert testimony on this point.

12.

The defendant IOD will bear all costs.

THUS DONE AND SIGNED in chambers at Opelousas, Louisiana, this 12th day of December, 1983.

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

LONNIE PICKLE

VS. CIVIL ACTION NUMBER 80-1955

INTERNATIONAL OILFIELD DIVERS, INC., ET AL SECTION O

SUPPLEMENTAL OPINION

The purpose of this supplement is to address the plaintiff's request for prejudgment interest and to set forth the method by which such interest should be calculated. The plaintiff elected to sue his employer in admiralty rather than on the law side of the Court, and is accordingly entitled to prejudgment interest absent the presence of 'peculiar circumstances' that would make it inequitable for the defendants to be forced to pay prejudgment interest. *Doe v. A. Corp.*, 709 F.2d 1031, 1043 (5th Cir. 1983).

Further, the fact that this suit was also brought pursuant to the Jones Act does not preclude an award of prejudgment interest because the plaintiff proceeded in admiralty rather than at law. *Doucet v. Wheless Drilling Company*, 467 F.2d 336, 340 (5th Cir. 1972). The Court has found no factors present to deny plaintiff's request. Accordingly, prejudgment interest will be awarded according to the following method.

With regard to the amount of ONE HUNDRED FORTY-FIVE THOUSAND FIFTY-SIX AND 57/100 ($145,056.57) DOLLARS for past loss wages and meals, discount has not been calculated back to the date of accident. Therefore, the ONE HUNDRED FORTY-FIVE THOUSAND FIFTY-SIX AND 57/100 ($145,056.57) shall be discounted back to date of accident at the real rate of interest of 1.83% as determined by Dr. Goodman at trial, (the market rate of 9.75% less the wage growth rate of 7.92%) after which the plaintiff will be awarded prejudgment interest on all awards at the rate of 9.75% from date of accident, January 29, 1978, until date of judgment.

It is also ORDERED that counsel for plaintiff submit a judgment reflecting the discount ordered herein within twenty (20) days.

Opelousas, Louisiana, January, 31, 1984.

/S/ Signed

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

LONNIE PICKLE
VS. CIVIL ACTION NUMBER 801955

INTERNATIONAL OILFIELD DIVERS, INC., ET AL SECTION O

RULING

After having carefully reviewed the arguments set forth in the motion for new trial filed March 2, 1984 by the attorneys for the excess insurer of International Oilfield Divers, the Court concludes that its original Findings of Fact and Conclusions of Law are correct and, thus, the motion for a new trial is DENIED.

Opelousas, Louisiana, April 27th, 1984.

/S/ Signed

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

LONNIE PICKLE	CIVIL ACTION
VS.	NO.
INTERNATIONAL OILFIELD DIVERS, INC., ET AL	80-1955 "S"

JUDGMENT

This action came on for trial before the Court, Honorable John M. Shaw, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered.

IT IS ORDERED AND ADJUDGED that plaintiff, LONNIE PICKLE, recover judgment from defendant, INTERNATIONAL OILFIELD DIVERS, INC., the sum of FOUR HUNDRED NINETY FOUR THOUSAND SEVEN HUNDRED SEVENTEEN AND 37/100 ($494,717.37) DOLLARS, together with interest at the rate of 9.75 percent from January 29, 1978, until the date of this judgment, and interest at the rate of 9.87 percent from the date of this judgment until paid.

IT IS ORDERED AND ADJUDGED that if plaintiff requires a lumbar fusion in the future that he can pursue a claim for cure against the defendant, INTERNATIONAL OILFIELD DIVERS, INC.

IT IS FURTHER ORDERED AND ADJUDGED that MARYLAND CASUALTY COMPANY, intervenor, be reimbursed out of plaintiff's recovery the sum of TWENTY NINE THOUSAND THREE HUNDRED FIFTY FOUR AND 19/100 ($29,354.19) DOLLARS.

IT IS FURTHER ORDERED that the defendant, INTERNATIONAL OILFIELD DIVERS, INC., be reimbursed out of plaintiff's recovery the sum of TWENTY SIX THOUSAND AND NO/100 ($26,000.00) DOLLARS.

IT IS FURTHER ORDERED AND ADJUDGED that the third party claim of the defendant, INTERNATIONAL OILFIELD DIVERS, INC., against CORPUS CHRISTI OIL & GAS be dismissed.

THUS DONE AND SIGNED in Opelousas, Louisiana, this 15th day of February, 1984.

/S/ Signed

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

ENTERED: _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4348

LONNIE PICKLE,
Plaintiff-Appellee,

MARYLAND CASUALTY COMPANY,
Intervenor-Appellee,

versus

INTERNATIONAL OILFIELD DIVERS, INC.,
Defendanat-Appellant.

Appeal from the United States District Court of the
Western District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 6/16/86, 5 Cir., 198__, ____F.2d____)

(July 30, 1986)

Before GARZA, POLITZ, and HILL, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/ Signed

HENRY A. POLITZ
United States Circuit Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

LONNIE PICKLE

VS. CIVIL ACTION NUMBER 80-1955

INTERNATIONAL OILFIELD
DIVERS, INC., ET AL SECTION O

RULING

This case was remanded by the United States Court of Appeals for the Fifth Circuit on August 11, 1986 with directions, and in accordance therewith, the court makes the following findings:

I.

Underwriters of Lloyd's of London (Underwriters) is made a party to this suit and is cast in judgment with International Oilfield Divers (IOD) for the claim of Lonnie Pickle (Pickle).

II.

The total award for general damages, including pain and suffering, of $85,000 is divided as follows: $42,500 for past losses and $42,500 for future losses. This division is made on the basis that the most severe pain and suffering

resulted during the period surrounding the accident and from the surgeries that have already occurred. Pre-judgment interest will be awarded on the past loss of $42,500.

III.

Pickle will reimburse IOD $26,000 out of his award.

IV.

Maryland Casualty Company (Maryland) and Pickle have stipulated that Pickle will pay Maryland $4,500 in settlement of Maryland's overpayment.

The court feels an explanation is in order as to why pre-judgment interest is awarded on future economic loss in this matter.

This court's initial decision was rendered on December 12, 1983. *Culver v. Slater Boat Co.*, 722 F.2d 114 (5th Cir. 1983) (Culver II) was decided on December 22, 1983, ten days later. In *Culver II,* the court stated:

> Although we adopt a single method for adjusting future damage awards, our ruling, made on application for rehearing, shall not apply to any case in which, before the date this opinion was published, either a jury returned a verdict after being instructed on the basis of principles set forth in Culver I, or a judge made findings of fact fixing damages pursuant to those principles.

Culver at 123.

Although part XII of *Culver I* was withdrawn the above still applies to cases decided prior to December 22, 1983.

In *Culver I*, 688 F.2d 280 at page 311, the court stated:

> In those instances where the substantive law permits a court to award pre-judgment interest, the court must discount the damage figure back to the date of the event, i.e. injury or death, and may award pre-judgment interest for the period between the event and judgment.
> (footnote omitted)

The above principle does not state on *what amount* pre-judgment interest would be awarded but if it required the court to discount the whole award back to date of accident instead of date of trial, it certainly meant that pre-judgment would be awarded on the entire award for economic loss, past and future. Otherwise, assuming the discount rate was 8% and the court would award pre-judgment interest at that rate, the plaintiff would have an award for pre-judgment but would received zero for it.

The attorney for the plaintiff is directed to submit a judgment in conformity with this ruling within ten (10) days.

Opelousas, Louisiana, September 11, 1986.

/S/ Signed

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

LONNIE PICKLE

VS. CIVIL ACTION NUMBER 80-1955

INTERNATIONAL OILFIELD DIVERS, INC., ET AL SECTION O

JUDGMENT

Pursuant to a remand by the United States Court of Appeals for the Fifth Circuit, and in accordance with this court's ruling of September 11, 1986

It is ORDERED AND ADJUDGED that plaintiff, Lonnie Pickle, recover judgment from defendants, International Oilfield Divers, Inc., and John Patrick Fisher and Dennis Edward Jennings, on behalf of "Certain Underwriters at Lloyd's of London" for economic loss in the sum of THREE HUNDRED NINETY-THREE THOUSAND FOUR HUNDRED SIXTY AND 78/100 ($393,460.78) DOLLARS itemized as follows:

1.	Past loss of earnings and benefits from the date of the accident, January 29, 1978, to the date of trial, November 21, 1983, discounted to the date of the accident at the real rate of interest	$137,381.65
2.	Future loss of earnings and benefits, discounted	334,072.39
3.	Unpaid medical bills	4,048.50
	Subtotal	$475,502.54
4.	Less minimum wage from September 19, 1981, to work life expectancy	82,041.76
	TOTAL	$393,460.78

together with interest at the rate of 9.75% from January 29, 1978, until the date of the first judgment, February 15, 1984; and interest at the rate of 9.87% from February 15, 1984, until the date of this judgment, and therefafter at the rate of 5.79% until paid.

It is ORDERED AND ADJUDGED that the plaintiff be awarded the additional amount of FORTY-TWO THOUSAND FIVE HUNDRED AND NO/100 ($42,500.00) DOLLARS against the defendants, International Oilfield Divers, Inc., and John Patrick Fisher and Dennis Edward Jennings on behalf of "Certain Underwriters at Lloyd's of London" representing general damages, including pain and suffering from the date of the accident until the date of trial; together with interest at the rate of 9.75% from January 29, 1978, until the date of the first judgment, February 15, 1984; and interest at the rate of 9.87% from February 15, 1984, until the date of this judgment, and thereafter at the rate of 5.79% until paid.

It is further ORDERED, ADJUDGED AND DECREED that the plaintiff be awarded the sum of FORTY-TWO THOUSAND FIVE HUNDRED AND NO/100 ($42,500.00) DOLLARS representing future general damages, including pain and suffering, against the defendants, International Oilfield Divers, Inc., and John Patrick Fisher and Dennis Edward Jennings of behalf of "Certain Underwriters at Lloyd's of London" with interest at the rate of 9.87% from the date of the first judgment, February 15, 1984, until the date of this judgment, and thereafter at the rate of 5.79% until paid.

It is further ORDERED AND ADJUDGED that Maryland Casualty Company, intervenor, be reimbursed out of plaintiff's recovery the sum of FOUR THOUSAND FIVE HUNDRED AND NO/100 ($4,500.00) DOLLARS pursuant to a stipulation between the plaintiff, Lonnie Pickle, and said intervenor, Maryland Casualty Company.

It is further ORDERED that the defendant, International Oilfield Divers, Inc., be reimbursed out of plaintiff's recovery the sum of TWENTY-SIX THOUSAND AND NO/100 ($26,000.00) DOLLARS.

THUS DONE AND SIGNED at Opelousas, Louisiana, this 29th day of September, 1986.

/S/ Signed

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

NO. 86-703

In the Supreme Court of the United States

OCTOBER TERM, 1986

INTERNATIONAL OIL FIELD DIVERS, INC.,
Petitioner,

and

JOHN PARTICK FISHER AND
DENNIS EDWARD JENNINGS,
ON BEHALF OF CERTAIN UNDERWRITERS
AT LLOYD'S, LONDON,
Petitioners,

versus

LONNIE PICKLE,
Respondent,

MARYLAND CASUALTY COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

Lawrence K. Burleigh
Lawrence K. Burleigh, Ltd.
P. O. Box 2625
Morgan City, Louisiana 70381
Telephone (504) 384-1910
Attorney for Respondent,
Lonnie Pickle

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

INTERNATIONAL OIL FIELD DIVERS, INC.,
Petitioner,
JOHN PARTICK FISHER AND
DENNIS EDWARD JENNINGS,
ON BEHALF OF CERTAIN UNDERWRITERS
AT LLOYD'S, LONDON,
Petitioners,
versus
LONNIE PICKLE,
Respondent,
MARYLAND CASUALTY COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI TO THE UNITED STSATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATUTORY PROVISIONS INVOLVED

1. Respondent accepts the "Statutory Provision Involved" section of petitioners' application, but adds section (b) of 46 U.S.C.A. § 688 on the basis that it is relevant to the issues discussed herein.

46 U.S.C.A. § 688, (Jones Act)

(a) Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury,

and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

(b)(1) No action may be maintained under subsection (a) or under any other maritime law of the United States for maintenance and cure or for damages for the injury or death of a person who was not a citizen or permanent resident alien of the United States at the time of this incident giving rise to the action, if the incident occurred --

(A) while that person was in the employ of an enterprise engaged in the exploration, development, or production of offshore mineral or energy resources -- including but not limited to drilling, mapping, surveying, diving, pipelaying, maintaining, repairing, constructing, or transporting supplies, equipment or personnel, but not including transporting those resources by a vessel constructed or adapted primarily to carry oil in bulk in the cargo spaces; and

(B) in the territorial waters or waters overlaying the continental shelf of a nation other than the United States, its territories, or possessions.

As used in this paragraph, the term "continental shelf" has the meaning stated in Article I of the 1958 Convention of the Continental Shelf.

STATEMENT OF THE CASE

This accident occurred on January 29, 1978. During his employment with the petitioner, IOD, in 1975, 1976, and 1977, respondent, Pickle, spent ninety (90%) percent of his working time aboard two (2) vessels, namely the PIPEFITTER III and the PIPEFITTER VII. He also worked aboard McDermott barges 16, 21, and 22. On all occasions he was assigned to the vessel for the duration of its voyage. The minimum time he worked aboard petitioner's vessels was for three (3) days, and the maximum time was for forty-five (45) days. His work contributed to the mission and function of the vessels.

On the job in question, he was assigned by IOD to the ETPM Barge 701 on January 9, 1978. His accident occurred twenty (20) days later.

At the time of the accident an IOD employee, Jim Connell, was the lead diver or diving supervisor on the job in question. Under IOD's published regulations, Connell set the diving rotation, and had the final authority to determine whether or not it was safe to dive. On January 29, 1978, the IOD crew was working on a "brace setting job" about ten (10) to fifteen (15) feet below the surface of the ocean. It was stipulated by the litigants that the seas were rough at the time of the accident.

Connell testified that the danger in performing the operation in rough seas is that the divers in the water will

be caught in the surge of the seas and washed into the platform causing injury.

Connell decided to have the crew attempt a final dive on the fateful day. He drew up the diving rotation, and ordered Pickle to make the first dive.

While performing his work, the surge (wave action) of the heavy seas washed Pickle into a platform brace causing the injuries which gave rise to this suit.

The trial judge found, as a matter of fact, in his opinion of December 12, 1983 (Petitioner's Writ Application at page A-49).

> "Plaintiff began working as a diver in 1965 and with IOD since it was formed in 1975. From 1975 until the job in question, IOD either secured or was provided for its diving operations, two barges from Cobb Offshore, the Norman Barges, Pipefitter 3 and 7 and McDermott Barges 16, 21, 22. Approximately ninety (90%) percent of the plaintiff's assignment during this period was on the PIPEFITTER III and VII and jobs lasted from three (3) to forty-five (45) days. At the time of the accident, IOD did not own any vessels."

The court found on the question of liability the following facts (Petitioner's Writ Application at page A-50):

> "The final authority vests with the lead diver to determine whether or not it is safe to dive. Jim Connell, the lead diver, prepared the diving

> schedule and although plaintiff did not protest prior to making his fateful dive, Connell did not call it off. As plaintiff said, 'When it came my time, I dove.' His was not to reason why. Once down, plaintiff performed his work in as safe and proper manner as was possible under the circumstances.":

The court concluded, as a matter of law, (Petitioner's Writ Application at page 54):

> "Plaintiff, Lonnie Pickle, was a seaman and member of the crew of the ETPM Barge 701, and would also qualify as a member of the crew of a specific group of vessels consisting of the Norman Barges, Pipefitter 3 & 7, McDermott Barges 16, 21, 22, on which plaintiff spent approximately ninety (90%) percent of his time in 1975, 1976 and 1977."

The court further concluded, as a matter of law, (Petitioner's Writ Application at page 55):

> "The lead diver for IOD, Jim Connell, was negligent in causing the plaintiff to do underwater work in rough seas which caused the plaintiff's injuries and the plaintiff was entirely free of any negligence. Plaintiff's duties was to do his work as he was instructed. He was in no sense obligated to protest against the method of operation which he had been instructed to follow. A Seaman's duty to protect himself is slight."

ARGUMENT

1. DID THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERR IN HOLDING THAT A SEAMAN HAS ONLY A SLIGHT DUTY TO EXERCISE REASONABLE CARE TO PROTECT HIMSELF?

The petitioner simply cannot argue with the factual finding made by the District Judge and affirmed by the Fifth Circuit that the respondent performed his work at the time of the accident in "a safe and proper manner", and the legal conclusion that followed "the plaintiff was entirely free of any negligence", so they attempt to circumvent this factual finding arguing that the Fifth Circuit misstated the tests when they said that "a seaman has only a slight duty to exercise reasonable care to protect himself." Respondent submits that the Fifth Circuit was correct in regards to a seaman's duty to protect himself when following a direct order from his superior. However, even if the Fifth Circuit had said "a seaman has a duty to exercise reasonable care to protect himself" it would make no difference in this case since, as a matter of fact, the respondent performed the work to which he was assigned in a "safe and proper manner."

The petitioner argued on the trial level and on appeal that the plaintiff appreciated the danger of diving in rough seas and because of that state of mind he should have been found to have been at least partially responsible to some degree. In reality, what the petitioner is arguing is that the respondent assumed the risk of working under hazardous conditions.

Assumption of the risk is not available as a defense in Jones Act and admiralty cases. *Sinkler v. Missouri Pac. R. Co.*, 356 U.S. 326, 78 S.Ct. 758, 2 L.Ed.2d 799 (1958).

In *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 524, 1 L.Ed. 2d 511, 515, 77 S.Ct. 457, 459, the Supreme Court said that the Jones Act employer and shipowner has a duty to provide the seaman with a safe place to work, and a seaworthy vessel, and maintenance and cure for ill seaman, and is responsible for the seaman's damages under the Jones Act, if their negligence played any part even the slightest in producing the injury. In light of the Jones Act employer's obligation what then is the duty of a seaman to protect himself in the face of a direct order by his supervisor to perform his work under unsafe conditions?

The Fifth Circuit Court of Appeals correctly answered this question in the case of *Spinks v. Chevron Oil Company*, 507 F.2d 216 (5th. Cir., 1975), at page 523;

> "The duty owed by an employer to a seaman is so broad that it encomplasses the duty to provide a safe place to work. *Vickers v. Toomey*, 5 Cir. 1961, 290 F.2d 426, 429-432. See Gilmore and Black, *The Law of Admiralty*, § 6-37 (1957); Norris, *The Law of Seaman*, Section 692 (3d) ed., 1970). By comparison the seaman's duty to protect himself, (the grounds for any counteravailing legal interest serving to exculpate the employer) is slight. His duty is to do the work assigned, not to find the safest method of work. This is especially true when the supervisor, Hanks in this case, knows the working method used by the seaman, and does nothing about it.

The test set out by the Court in *Spinks* and the cases cited therein, has legal precedence, and conforms with the remedial purposes of admiralty tort law. For, if this is not so, the seaman could not recover his damages based on Jones Act negligence, or the General Maritime Law concept of unseaworthiness, unless he protested or disobeyed the order of the ship's captain or an immediate supervisor.

II. THE COURTS OF APPEALS ARE SHARPLY DIVIDED CONCERNING THE CRITERIA NECESSARY TO ESTABLISH SEAMAN STATUS WITHIN THE MEANING OF THE JONES ACT, 46 U.S.C.A. § 688.

It is well established in this Court, that whether or not a maritime worker is a member of a crew of any vessel is a question of fact. Special-purpose vessel crew members who have no navigational tasks are entitled to Jones Act relief as seaman. *Gianfala v. Texas Company*, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 776 (1955); *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252, 78 S.Ct. 687, 2 L.Ed. 2d 737 (1958); *Butler v. Whiteman*, 356 U.S. 271, 78 S.Ct. 734, 2 L.Ed. 2d 754 (1958). *Senko v. Lacrosse Dredging Corp.*, 352 U.S. 370, 77 S.Ct. 415, 1 L.Ed.2d 404 (1957).

The Fifth Circuit's tests follows the mandate of the Supreme Court. This test for seamen status was established in *Offshore v. Robinson*, 266 F.2d 769 (5th Cir., 1959), and restrictively refined in *Barrett v. Chevron Oil Co.*, 781 F2d 1067 (5th Cir., 1986).

Basically, to qualify as a seaman, the marine casualty victim must be assigned to a "vessel in navigation" (which included special-purpose structures not usually

employed as a means of transport by water, but designed to float on water) *or* he must perform a substantial part of his work on such a vessel *and* the capacity in which he is employed or the duties he performs must contribute to the function of the vessel or to the accomplishment of its mission or to the maintenance during movement or anchorage for future trips. See *Wallace v. Oceaneering*, 727 F2 427 (5th Cir., 1984) and the cases cited therein. In *Wallace*, the Fifth Circuit held that a commercial diver was a seaman,

> (p.436)
> "We hold that a commercial diver who embodies the traditional and inevitably maritime task of navigation, has the legal protections of a seaman when a substantial part of his duties are performed on vessels."

The tests set forth are designed to deny seamen status to those who have only random, sporadic or transitory affiliation with a vessel. *Ardoin v. J. Ray McDermott & Co.*, 641 F2 277 (5th Cir., 1981).

Hence, amphibious workers whose tasks aboard a vessel are merely incidental or casual to their overall work are not seamen.

In this case, Pickle spent ninety (90%) percent of his work time aboard two (2) vessels, namely the PIPEFITTER III and VII. The voyages lasted from three (3) days to forty-five (45) days. One of the functions of the vessels was to serve as a diving base for deep sea divers who performed underwater work. Pickle and the other divers worked, ate and slept on the vessels during their voyages.

A rule that would permit a cook aboard the vessel to have Jones Act protection, but would deny the same protection to divers who face all the seas perils would not be reasonable, nor would it comply with the remedial purposes of admiralty tort law.

It is certainly arguable that divers as well as others assigned to vessels for long periods of time have some duties related to the vessel's transportation, however, no evidence was adduced in that regard because it was not required under existing case law.

In 1982, the Jones Act was amended, 46 U.S.C..Section 688 (b). In that legislation, Congress only denied Jones Acts relief to foreigners working aboard oil-patch vessels in foreign waters. American citizens were not effected. If the United States Congress intended to change the rights of American citizens or resident aliens working aboard vessels, whether considered conventional or special purpose, they could have considered it in 1982, but, as a matter of fact, they were specific in their intent not to effect Jones Act relief to American citizens or resident aliens.

In this case, the fact finder, a United States District Judge, found that the respondent who spent ninety (90%) percent of his work time in the employ of the petitioner was a member of a crew of the vessel upon which he was working at the time of his accident, as well as a designated fleet of vessels provided by his employer, and that finding should not be disturbed. The petitioner does not argue that these barges were not vessels because, as a matter of fact, they have mess facilities, living quarters, lines, bits, and they are navigated upon the ocean just as is any other vessel.

Finally, the petitioner in this case seeks another appraisal of the facts, previously determined by a district judge and the Court of Appeals for the Fifth Circuit. This is not the function of a writ of certiorari. *Rogers v. Missouri Pac. R. Co.*, 1 L.Ed.2d 515, 352 U.S. 559.

CONCLUSION

For the above and foregoing reasons, respondent respectfully submit that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

Lawrence K. Burleigh
Lawrence K. Burleigh, Ltd.
P. O. Box 2625
Morgan City, Louisiana 70381
Telephone (504) 384-1910
Attorney for Respondent,
Lonnie Pickle

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

INTERNATIONAL OILFIELD DIVERS, INC., ET AL. *v.* LONNIE PICKLE ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 86–703. Decided January 20, 1987

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

The Jones Act, 46 U. S. C. § 688(a), provides that "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law. . . ." This case presents the question of who is a "seaman" for purposes of the Jones Act.

The Court of Appeals for the Fifth Circuit, both in this case and in its previous cases, has taken an expansive view in defining who is a seaman. The Fifth Circuit, relying on its earlier opinion of *Offshore Co.* v. *Robison*, 266 F. 2d 769 (CA5 1959), has taken the position that to be a seaman, a person need not assist in the transportation function of a vessel. See *Barrett* v. *Chevron, U. S. A., Inc.*, 781 F. 2d 1067, 1073 (CA5 1986) (en banc). Other courts of appeals, particularly the Third and Seventh Circuits, have rejected this view and require that before a plaintiff can sue under the Jones Act, he must be employed in such a way as to assist in the navigational function of a vessel. See *Johnson* v. *John F. Beasley Construction Co.*, 742 F. 2d 1054, 1061 (CA7 1984) ("[W]e think the second part of the *Robison* test strays from important Jones Act principles when it speaks of the employee's duties as having to relate only to the 'function of the vessel or the accomplishment of its mission' without further qualifying 'function' and 'mission' in terms of the *transportation* function and mission of the vessel.") (emphasis in original), cert. denied, 469 U. S. 1211 (1985); *Simko* v. *C & C Marine Maintenance Co.*, 594 F. 2d 960, 964–965 (CA3), cert. denied, 444

U. S. 833 (1979). There is even disagreement within the Fifth Circuit over this point. See *Barrett*, *supra*, at 1076 (Gee, J., specially concurring).

Because of the direct split among the courts of appeals, I would grant the petition.